



Immigration Issues

BUSH ORDERS MILITARY TRIBUNALS FOR NONCITIZENS ACCUSED OF TERRORIST ACTS – Drawing on his authority as commander-in-chief, President George W. Bush has signed an executive order allowing the use of military tribunals to try non-U.S. citizens accused of international terrorism. In issuing the order, which dispenses with the “principles of law and . . . rules of evidence generally recognized . . . by the U.S. district courts” in criminal trials, he cited the “extraordinary emergency” created by the September 11 terrorist attacks.

The Nov. 13, 2001, order has been the subject of intense controversy. It has elicited criticism from civil libertarians, immigrants’ rights advocates, and lawmakers concerned with its sharp departure from longstanding principles and procedures of American jurisprudence. For example, the order appears to authorize tribu-

nals to conduct proceedings outside public scrutiny, reach convictions on two-thirds majority votes, and issue sentences—even the death penalty—that are not subject to judicial review. In addition, some observers have pointed out that the order’s death penalty provision may be affecting the support of some allies for the U.S.’s antiterrorism efforts. A number of European governments that do not sanction capital punishment have already stated that they will refuse requests to extradite individuals arrested in connection with the September 11 attacks.

Who is Affected by the Order? The executive order covers any individual who is not a U.S. citizen, who the president finds reason to believe is or was a member of the Al Qaeda organization. Also subject are persons who have “engaged in, aided or abetted, or conspired to commit, acts of international terrorism . . . that have caused, threaten to cause,” or are intended to cause “injury to or adverse effects on the U.S., its citizens, national

IN THIS ISSUE

IMMIGRATION ISSUES

Bush orders military tribunals for noncitizens accused of terrorist acts	1
Justice Dept. announces plan to interview 5,000 men	2
Chief immigration judge issues guidelines for secret removal hearings	3
INS issues interim rule on detention under final removal orders	3
INS announces restructuring plan	6
Attorney general advises federal agencies to withhold FOIA information	9
BIA: “Unusual or outstanding equities” requirement not applicable to LPR cancellation adjudications	9
INS publishes corrected address for <i>Walters</i> class members requesting refunds	10
INS to require use of most recent version of Form N-400 application for naturalization	10

LITIGATION

6th Circuit rules reinstatement of removal not applicable where reentry occurred prior to April 1, 1997	10
9th Circuit reverses BIA’s denial of Convention Against Torture claim	10

9th Circuit rules LPR contesting deportability not eligible for 212(h) waiver	11
PA district court denies INS motion to dismiss review of agency’s refusal to consent in special immigrant juvenile case	11
9th Circuit rules reinstatement statute bars challenge to prior deportation order that was based on retroactive application of AEDPA	12
Update to <i>CSS</i> and <i>LULAC</i> class members, attorneys, and advocates	12

EMPLOYMENT ISSUES

Newly enacted citizenship requirement to displace thousands of airport security screeners	13
Workers protected from further retaliation and threats of being reported to the INS	14
Union reaches settlement on behalf of workers fired based on Social Security no-match letters	15

IMMIGRANTS & WELFARE UPDATE

Food stamp restoration included in Senate Farm Bill to be considered in January	15
OMB requests information on costs of implementing executive order on services for LEP persons	16

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.

security, foreign policy, or the economy.” Individuals who participate in activities in preparation for such terrorist acts are also subject to the order, as well as are persons who harbor members of Al Qaeda or others who have engaged in terrorist acts.

Such individuals must be detained, either inside or outside the U.S., and they must be treated humanely and provided adequate food, water, shelter, clothing, and medical attention. They must also be allowed, within the confines of their detention, to freely exercise their religion.

Military tribunals are authorized to try individuals for any and all offenses that they have allegedly committed that are covered by the order. Such individuals may be punished according to applicable law, including life imprisonment and, as noted above, the death penalty.

The Secretary of Defense's Authority under the Order. The secretary of Defense is directed to appoint one or more military commissions and issue orders and regulations for conducting military tribunals. These rules must include provisions describing pretrial, trial and, post-trial procedures; modes of proof; issuance of process; and qualifications of attorneys. These regulations are to provide for

- military commissions to sit at any time and place;
- “full and fair trials,” with the military commission sitting as trier of fact and law;
- admission of evidence that, in the opinion of the presiding officer, would have “probative value to a reasonable person” (at the time the presiding officer renders the opinion, a commission member may request that the commission adopt the opinion of the commission majority on the evidence at issue);
- the handling of evidence, material, or other information and the conducting and closing of proceedings in a manner consistent with Executive Order 12958 of Apr. 17, 1995 (which is concerned with classified national security information) and with related statutes and regulations;
- the conduct of the prosecution by one or more attorneys designated by the secretary of Defense and the conduct of the defense by attorneys on behalf of the individual subject to the order;
- convictions requiring only a two-thirds majority of commission members present at the time of the vote (a majority of the commission must be present for the vote);
- sentencing that also requires only a two-thirds majority of commission members present at the time of the vote (a majority of the commission must also be present for this vote); and
- submission of the trial record, including any conviction or sentence, for review and final decision by the president or the secretary of Defense, if so designated by the president.

Exclusive Jurisdiction and Relationship to Other Laws. In addition, under the order, military tribunals have exclusive jurisdiction over individuals subject to this order. They may not seek any remedy or maintain any proceeding, directly or indirectly, in any court of the United States, any state court, any court of any foreign nation, or any international tribunal.

Finally, the order specifies that nothing in it shall be construed to authorize the disclosure of state secrets to any person not authorized to have access to them; to limit the authority of the president to grant reprieves or pardons; or to limit the secretary of Defense's authority to try any person who is not subject to

this order. Nor may it be interpreted to create any right, benefit, or privilege, enforceable at law or equity, by any party against the U.S., or any of its departments, agencies, or other entities.

Bush Order, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” (Nov. 13, 2001); published at 66 Fed. Reg. 57,831–36 (Nov. 16, 2001).

JUSTICE DEPT. ANNOUNCES PLAN TO INTERVIEW 5,000 MEN – On Nov. 13, 2001, the U.S. Dept. of Justice (DOJ) announced plans to interview 5,000 men from countries where terrorist groups are active. The men to be questioned are between the ages of 18 and 33 and arrived in the U.S. since January 2000 as students or visitors. The DOJ insisted that these interviews would be voluntary. The interviews will be coordinated through the Anti-terrorism Task Forces in each of the U.S. attorney districts and involve the assistance of local law enforcement officials. Although DOJ officials declined to identify the countries in question, the list of 5000 men contains names mostly of apparent Middle Eastern origin.

The DOJ also announced plans to reward noncitizens who offer information that helps the Federal Bureau of Investigation apprehend terrorists or thwart attacks. Attorney General John Ashcroft offered “S” visas to individuals who assist in such investigations. S visas are available to noncitizens who provide useful and reliable information in criminal investigations. Individuals who obtain such visas may remain in the U.S. for up to three years and thereafter apply to become permanent residents. In a later development, the INS stated that where officials encounter individuals whom it suspects to be in violation of their immigration status, they must refer those cases to the INS.

In issuing its plan to interview the 5,000 men, the DOJ instructed U.S. attorneys on how to conduct interviews of the men. Federal prosecutors and local law enforcement agencies providing assistance are directed to inquire about the following:

- Telephone numbers used by them and their families or close associates.
- Residences they have used since their arrival in the country.
- Foreign travel they have engaged in.
- What foreign countries they have visited and the dates of such visits, including any trips to Afghanistan.
- Reasons for their visit to the U.S. If they are here on a student visa, officials are directed to ask about their studies and future plans. If they are here as a tourist, officials must ask about the cities, landmarks, and other sites they have visited or plan to visit. Officials should also ask when they plan to leave the U.S. and where they plan to go. The purpose of any trips they have made outside the U.S. since their entry should also be asked about.
- Knowledge of events of September 11. Officials must ask about their knowledge concerning the September 11 attacks and about how they felt when they heard the news.
- Involvement in terrorism. Officials must ask whether they know anybody who had any involvement in advocating, planning, supporting, or committing terrorist activities and whether they have ever had any personal involvement in such activities.
- Knowledge of weapons. Officials are also required to ask them whether they or anybody they know has access to guns or any explosives or harmful chemical compounds and whether they

have any training in the development or use of such weapons. They should also be asked if they know of anyone who is capable of developing any biological or chemical weapons, such as anthrax.

CHIEF IMMIGRATION JUDGE ISSUES GUIDELINES FOR SECRET REMOVAL HEARINGS – Chief Immigration Judge Michael Creppy has issued instructions regarding special “security procedures” that are to be followed by immigration courts in cases designated by the Office of Chief Immigration Judge. The instructions, issued in a memo dated Sept. 21, 2001, state that because some of these cases involve classified evidence, they must be assigned to immigration judges who currently hold at least a “secret clearance.” Hearings in these cases are to be conducted separately from all other cases on the court docket, and these cases are not to appear on posted court calendars.

The instructions also specify that the courtroom must be closed for these cases—“no visitors, no family, and no press.” Inquiries about these cases made to the 1-800 number, which normally provides information as to the status of a case, will receive only the message, “Information cannot be released regarding this case. Please contact your local immigration court or the Board of Immigration Appeals if further information is required.” In addition, all courtroom personnel are directed not to discuss these cases with anyone. And the instructions specify that “[t]his restriction on information includes confirming or denying whether such a case is on the docket or scheduled for hearing.”

INS ISSUES INTERIM RULE ON DETENTION UNDER FINAL REMOVAL ORDERS – In light of the U.S. Supreme Court’s finding that the Immigration and Naturalization Service may not indefinitely detain individuals who are ordered removed but cannot be repatriated, the U.S. Dept. of Justice published an interim regulation governing the custody review process following the removal period. The interim rule took effect on Nov. 14, 2001. Comments on the interim rule are due on or before Jan. 14, 2002.

After an individual is ordered removed, the INS has 90 days to remove him or her. However, repatriation is difficult to accomplish for some individuals, such as those without nationalities or persons born in countries that do not have repatriation treaties with the U.S. (such as Cuba or Vietnam). Prior to the Supreme Court’s ruling in *Zadvydas v. Davis*, 121 S.Ct. 2491 (2001), the INS had been holding such persons under the “post-removal detention statute,” sometimes indefinitely. In *Zadvydas*, the Court ruled that such persons may be detained only for “periods reasonably necessary to bring about [their] removal from the U.S.”

The interim rule creates two new sections, 8 C.F.R. sections 241.13 and 241.14, and amends several other sections. Section 241.13 establishes special review procedures allowing the release of detained individuals who are subject to final orders of removal but for whom no “significant likelihood” of removal “in the reasonably foreseeable future” exists. Section 241.14 provides a procedure for the INS to use for individuals the agency determines are especially dangerous.

The new rule amends section 241.4, which allows for the con-

tinued detention of individuals beyond the 90-day removal period. Section 241.4(g) also includes a new subsection stating that the removal period for an individual subject to a final order begins on the latest of the following dates:

- the date the order becomes administratively final;
- the date on which the removal can be executed and the individual may be removed, if the removal order is subject to judicial review and the court has ordered a stay of the individual’s removal; or
- the date the individual is released from detention, if the individual was detained for reasons unconnected to removability.

The interim rule also amends section 241.4(g) to extend the removal period if an individual fails to apply for travel or other necessary departure documents in a timely way or in any way acts to prevent his or her removal. In such situations, the INS must provide the individual with a Notice of Failure to Comply before the expiration of the removal period. The rule adds that the INS’s failure to provide the notice does not excuse the individual’s conduct and will not keep the removal period from being extended. Once the individual has complied with the requirements, the INS has a reasonable period of time to act on the individual’s removal.

During the custody review process, if the individual submits or the record contains information providing a substantial reason to believe that his or her removal is not significantly likely in the reasonably foreseeable future, the Headquarters Post-order Detention Unit (HQPDU) must initiate the review procedures under new section 241.13. The HQPDU is a unit designated to have review authority over custody decisions. The HQPDU may consider any information developed during the custody review process.

Individuals Covered by the Rule. Lawful permanent residents who have been admitted to the U.S., including refugees admitted under Immigration and Nationality Act section 207, are covered. Also covered by the rule are other deportable immigrants who present a danger or flight risk, and inadmissible immigrants who are present in the U.S. without inspection. The interim rule does not apply to arriving aliens, Mariel Cubans, and other parolees. (Mariel Cubans are covered under 8 C.F.R. section 212.12.) In addition, the interim rule does not apply to individuals under a final order of removal who are still within the statutory removal period or individuals ordered removed by the Alien Terrorist Removal Court.

Procedure for Release. At any time after the removal order becomes final, an individual may submit a written request for release to the HQPDU asserting that there is no significant likelihood that he or she will be removed to the country of removal or to a third country in the reasonably foreseeable future. The individual may add supporting documents to the request, including information demonstrating his or her attempts to secure travel documents. The HQPDU must respond to the individual, and send a copy of the response to counsel of record, within ten business days of receiving the request.

The interim rule provides that the HQPDU must first determine if the individual has made reasonable efforts to comply with the removal order or has obstructed the removal process in any way. If the latter is the case, the HQPDU must so advise the individual in writing and provide a copy to his or her counsel. The HQPDU

must inform the individual of the efforts he or she needs to make in order to assist in securing travel documents and of the consequences of failure to cooperate. The INS is not obligated to consider the request further until the individual responds to the HQPDU and establishes his or her compliance with statutory requirements.

Next, the HQPDU is to forward a copy of the individual's release request to the Dept. of State for information and assistance. The State Dept. may provide information about country conditions or other facts relevant to whether a travel document may be obtained from the country at issue. The State Dept. may also assess the accuracy of the individual's contention that he or she cannot be returned to a particular country. When the INS relies on the information provided by the State Dept., that information becomes part of the record. The INS must allow the individual to respond to the INS's evidence. The HQPDU may also interview the individual, telephonically or in person, and if necessary will provide an interpreter.

The HQPDU must consider all of the facts of the case, including (but not limited to)

- the history of the INS's efforts to remove individuals to the country in question or to third countries (including the INS's efforts to remove the individual);
- the individual's assistance with those efforts;
- the reasonably foreseeable results of those efforts;
- the views of the State Dept. regarding the prospects for removal of individuals to the country or countries in question; and
- the receiving country's willingness to accept the individual.

The rule provides that where the INS is continuing its efforts to remove the individual, there is no period of time, presumptive or otherwise, within which the individuals' removal must be accomplished. However, the prospects for the timeliness of removal must be reasonable under the circumstances.

The HQPDU must issue a written decision based on the administrative record, including any documentation provided by the individual regarding the likelihood of removal, and must provide the decision to the individual and his or her counsel.

If the HQPDU determines that there is no significant likelihood that the individual will be removed in the reasonably foreseeable future, the HQPDU must inform the individual. Unless there are special circumstances justifying continued detention, the INS must make, subject to appropriate conditions, prompt arrangements for the individual's release. Before establishing conditions for release or referring the individual for further proceedings, the INS may require a medical or psychiatric team to examine the individual. If the individual refuses to submit to such an examination, the INS is not obligated to release him or her.

Conversely, if the HQPDU determines at the conclusion of the review that there is significant likelihood that the individual will be removed in the reasonably foreseeable future, the HQPDU must deny the individual's request for release. There are no administrative means to appeal the HQPDU decision denying a request from the individual.

Conditions of Release. According to the interim rule, the INS may impose certain conditions on the individual whom it releases. Those conditions are enumerated in INA section 241(a)(3) and 8 C.F.R. section 241.5 and include such requirements as periodic appearances before the INS and other "reasonable" restrictions.

Released individuals may be granted work authorization. A released individual who violates any of the conditions of release may be returned to custody and is subject to penalties under INA section 243(b). The HQPDU may refer certain cases to the U.S. attorney for criminal prosecution. In addition, the individual may be detained for an additional six months.

The interim rule also provides that the INS may revoke an individual's release and return the individual to custody if, due to changed circumstances, the agency determines that there is a significant likelihood the individual may be removed in the reasonably foreseeable future. If the individual is not released from custody following an informal interview, the provisions of 8 C.F.R. section 241.4 govern the individual's continued detention pending removal.

If the INS revokes the individual's release, it must notify the individual of the reasons for revocation and promptly interview the individual. The INS must also give the individual the chance to respond to the reasons for revocation. The individual may submit any evidence or information that he or she believes demonstrates no significant likelihood exists of his or her removal in the reasonably foreseeable future. The individual may also submit evidence showing that he or she did not violate the order of supervision. The revocation custody review must include an evaluation of any contested facts relevant to the revocation and a finding of whether the facts as determined warrant revocation and further denial of release.

If the INS denies an individual's request for release, the individual may submit a request for review of the detention six months after the last denial. The HQPDU must consider additional evidence provided by the individual or available to the INS as well as evidence submitted in the prior proceedings. However, the HQPDU must render an entirely new decision on the likelihood of the individual's removal in the reasonably foreseeable future.

The interim rule also adds a new section providing for the continued detention of removable individuals in special circumstances, notwithstanding the fact that no significant likelihood exists of their being removed in the reasonably foreseeable future. Such circumstances are described below.

Individuals with Highly Contagious Diseases. If after a medical examination the INS determines that an individual has a highly contagious disease that presents a threat to public safety, it may initiate efforts with public health, state, or local government officials to arrange for the individual's continued medical care or treatment. In such cases, the INS may not continue detention except upon the express recommendation of the relevant public health authority. The INS must make reasonable attempts to provide every available form of treatment while the individual remains in INS custody.

If the INS, in consultation with the public health service and the individual, identifies an appropriate medical facility that will provide treatment, then the individual may be released if he or she agrees to continue that treatment until no threat to public safety is posed on account of the disease.

Individuals Detained Due to Serious Adverse Foreign Policy Consequences of Release. The INS must continue to detain individuals when the attorney general or deputy attorney general certify in writing that

- regardless of the grounds upon which the individual has been

found inadmissible or removable, the individual is a person whose release the secretary of State has reason to believe would have potentially serious foreign policy consequences for the U.S.; and

- no conditions of release can reasonably be expected to avoid such consequences.

The attorney general or deputy attorney general's certification that an individual should not be released due to adverse foreign policy considerations should be made only after the INS consults with and receives a recommendation from the secretary of State. Although the certification may continue to be reviewed on a semi-annual basis, it is not subject to further administrative review.

Individuals Detained Due to Security or Terrorism Concerns. The INS must continue to detain a removable individual if written determinations have been made finding

- the individual is regarded as a terrorist under INA section 212(a)(3)(A) or (B) or the individual has or is likely to engage in activity that endangers national security;
- the individual's release presents a significant threat to national security or a significant risk of terrorism; and
- no conditions of release can reasonably be expected to avoid the threat to national security or the risk of terrorism.

The INS must notify the individual of its intent to maintain him or her in detention and of his or her right to submit a written statement and additional information for consideration by the INS commissioner. The INS must continue to detain the individual pending the attorney general's decision. Without compromising national security and classified information, the INS must also provide a description of the factual basis for the individual's continued detention. The individual must also be provided with a reasonable opportunity to examine evidence against him or her and to present information on his or her own behalf.

If the individual's final order of removal was based on inadmissibility grounds other than terrorist grounds, the INS must, if possible, interview the individual in person and take a sworn question and answer statement from him or her. If necessary, the INS must provide an interpreter. The individual may be represented at no expense to the government.

In recommending to the attorney general that custody must be maintained due to security or terrorism concerns, the commissioner must consider all relevant information, including but not limited to

- recommendations of INS officials, including the director of the HQPDU, the Federal Bureau of Investigation, and other federal law enforcement or national security agencies;
- any statements and information submitted by the individual;
- the extent to which the individual's previous conduct indicates a likelihood that his or her release would present a significant threat to national security or of terrorism; and
- other special circumstances indicating that release from detention would present a significant threat of terrorism or to national security.

The commissioner must send the recommendation to the attorney general in writing. If the continued detention is based on a significant risk of terrorism, the recommendation must state in as much detail as practicable the factual basis for the determination. Based on the INS's record and the commissioner's and

FBI's recommendations, the attorney general may certify that an individual should continue to be detained on account of security or terrorism grounds. The detention decision is subject to ongoing review on a semi-annual basis but is not subject to further administrative review.

Individuals determined to be especially dangerous. The INS must continue to detain an individual if his or her release would pose a special danger to the public because

- the individual has previously committed one or more crimes of violence as defined in 18 U.S.C. 16;
- the individual is likely to engage in acts of violence in the future, due to a mental condition or personality disorder and behaviors associated with those conditions; and
- no conditions of release can reasonably be expected to ensure the safety of the public.

An individual deemed especially dangerous may contest the determination at a hearing before an immigration judge. Assignment of jurisdiction for a hearing begins with the issuance of a notice of referral to an immigration judge (Form I-863). The INS must provide such individuals with a written notice that it is initiating proceedings and advise them of their rights in the hearing. Individuals must be provided with a list of free legal service providers, an interpreter if necessary, and the chance to examine witnesses and present evidence on their own behalf. They must also be given the chance to cross examine witnesses presented by the INS, including the author of any medical or mental health report.

The IJ must first hold a preliminary, or "reasonable cause," hearing to determine whether the evidence supporting the INS's determination is sufficient to proceed with a merits hearing. The INS bears the burden of establishing, by a show of material evidence, that reasonable cause exists. The reasonable cause hearing must commence no later than ten business days after the filing of the I-863. The individual is not required to offer any evidence on his or her behalf.

The IJ must render a summary decision within five days after the closing of the record unless an extension is mutually agreed upon, the chief IJ determines that exceptional circumstances make it impractical to render the decision, or the individual requests additional time. If the IJ determines that the INS has not met its burden, the proceedings must be ordered dismissed. If such an order is issued, the INS may, within two business days of the IJ's order, file an appeal with the Board of Immigration Appeals. Should the INS reserve its right to appeal, the IJ's order is stayed until the expiration of the time limit for filing an appeal. On the filing of an appeal, the IJ's order remains in abeyance until a final decision is reached. Should the IJ determine that the INS met its burden, the individual and the agency must be so advised, and a merits hearing to review the INS's determination must be scheduled.

Once the INS files an appeal of the IJ's decision, the BIA must rule on it by single Board member review, based on the record of proceedings before the IJ. BIA review must be expedited, as far as practicable, and given the highest priority among the appeals concerning detained individuals. A ruling on the appeal must be made within 20 business days of the filing of the notice. This deadline may be extended by agreement of both parties or by a determination from the chairman of the BIA that exceptional circumstances make it impractical to render the decision on a highly

expedited basis. The deadline may also be extended because of delay caused by the individual. If the BIA determines that the INS has met its burden, the BIA must remand the case to the IJ for a merits hearing. If the BIA determines that the INS has not met its burden, the review proceedings will be dismissed.

The Merits Hearing. Once reasonable cause to conduct a merits hearing has been established, the IJ must promptly schedule it and expedite the proceedings as far as practicable. The INS will have the burden of proving by clear and convincing evidence that the individual should remain in custody because the individual's release would pose a special danger to the public. The individual may, but is not required to, offer evidence on his or her own behalf.

In making any determination in a merits hearing, the IJ must consider the following nonexclusive list of factors:

- the individual's prior criminal history, particularly the nature and seriousness of any prior crimes involving violence or threats of violence;
- the individual's previous history of recidivism, if any, upon release from INS or criminal custody;
- the substantiality of the INS's evidence regarding the individual's current mental condition or personality disorder;
- the likelihood that the individual will engage in acts of violence in the future; and
- the nature and seriousness of the danger to the public posed by the individual's release.

After closing the record, the IJ will render a decision as soon as practicable. If the IJ determines that the INS has met its burden, an order providing for continued detention of the individual will be entered. Conversely, should the IJ determine that the INS did not meet its burden, the IJ will order the review proceedings dismissed. Either party may appeal an adverse decision to the BIA. Once the IJ orders proceedings dismissed, the INS will have only five business days to file a notice of appeal with the BIA.

As with the procedure in the reasonable cause hearing, if the INS reserves its right to appeal a dismissal, the IJ's orders are stayed until the expiration of the time to appeal. When the INS files a notice of appeal, the IJ's order remains in abeyance pending a final decision on the appeal. The stay will expire if the INS fails to file a timely notice of appeal. The BIA must conduct an expedited review and the decision reached by such a review is final.

After a final administrative decision by the IJ or the BIA dismissing the review proceedings, the INS must promptly release the individual under conditions of supervision. However, the conditions of supervision will not be subject to review by the IJ or the BIA.

If the IJ or the BIA ordered continued detention for the individual, the INS must ensure that ongoing periodic review of his or her continued detention takes place. The individual may also request a review of his or her custody based on changed circumstances. Such a request must be made in writing and directed to the HQPDU. A request for custody review may be made no earlier than six months after the last decision of the IJ or the BIA.

Material Change in Circumstances. The individual bears the initial burden of establishing that a material change in circumstances shows that his or her release would no longer pose a special danger to the public. Should the INS determine that the indi-

vidual is not likely to commit future acts of violence or that the agency will be able to impose conditions of release adequate to ensure the public's safety, the INS must release the individual from custody. If the INS determines that continued detention is needed in order to protect the public, the agency must provide a written notice to the individual stating the basis for its determination, including a copy of the evidence it relied upon.

Should the individual's release request be denied, the individual may file a motion with the immigration court that had jurisdiction over the merits hearing to set aside the determination reached in the prior review proceedings (i.e., the initial merits hearing, or the BIA's review of that hearing's finding). The IJ must consider any evidence submitted by the individual or relied upon by the INS and provide the agency an opportunity to respond to the motion.

If the IJ determines that the individual has provided good reason to believe that, due to a material change in circumstances, the individual no longer poses a special danger to the public, the IJ must set aside the determination reached in the proceeding that last considered the question and schedule a new merits hearing. The IJ must deny the motion if the individual fails to meet his or her burden. 66 Fed. Reg. 56,967-82 (Nov. 14, 2001).

INS ANNOUNCES RESTRUCTURING PLAN – The Immigration and Naturalization Service has unveiled a proposal for a major restructuring of the agency that would split its service and enforcement functions, though the INS would continue to be led by a single commissioner. The division would be implemented by replacing the current district and regional structure with a network of area and local offices whose work would be conducted under the auspices of either a service or enforcement bureau. Although the plan, which was announced on Nov. 14, 2001, does not require congressional approval, it will necessitate regulatory changes. Proposed changes will be phased in, with some of the plan's elements beginning to take effect immediately. Others are to be completed by fiscal year 2003. In a related development, the INS announced that Commissioner James Ziglar has named Richard Cravener, a former director of the agency's Houston district, as restructuring director.

The proposal is lengthy and contains detailed descriptions of implementation timelines, analyses of budgetary and personnel impacts, and related agency initiatives. The following summary, however, is limited to descriptions of the INS's two new major components and of offices with agency-wide responsibilities or authority that stand apart from them. It also provides a brief overview of budgetary impacts, the plan's timeline, and related initiatives. The complete proposal can be downloaded from the INS's website at www.ins.gov/graphics/index.htm.

BUREAU OF IMMIGRATION SERVICES

The Bureau of Immigration Services will have jurisdiction over immigration services such as asylum determinations, naturalization and adjustment of status adjudications, and requests for employment authorization. Reporting directly to the INS commissioner, an executive commissioner will head the bureau and have direct line authority over all area directors who, in turn, will supervise all field office directors. The proposal divides the coun-

try into six service areas, each of which will generally be comparable in size, in terms of both geographic area and population of service seekers.

The proposal places five offices in the new bureau. They are the Customer Relations Office; Office of Quality Assurance; Office of Service Center Operations; Office of Area Directors; and the Office of Asylum and Refugee Affairs.

Office of Customer Relations. Newly created by the proposal, this office will oversee all customer service initiatives in the bureau. The office will be staffed with trained case problem solvers who will work with individuals and be authorized to assist them with application-related difficulties. This office will report directly to the executive commissioner.

Office of Quality Assurance. Quality Assurance is another new office, and it will develop quality assurance and audit programs. Like customer relations, this office will report directly to the executive commissioner.

Office of Service Center Operations. This office will be responsible for the service centers. Currently accounting for approximately 70 percent of the INS's application workload, the service centers' work involves the adjudication of matters not requiring face-to-face interviews with applicants. The centers also collect fees and conduct pre-adjudication actions for applications that later require field office interviews.

Office of Area Directors. This office will be staffed by directors of the six service areas who will concentrate solely on immigration services. Each of the area directors will directly oversee the field office in his or her jurisdiction. The field offices will be responsible for the other 30 percent of the application workload, including naturalization, adjustment of status, interviews, fingerprinting, and other matters that require personal contact with INS service personnel. Because the Southwest and Northeast areas will have double the workload of the other four area offices, they will have additional staff.

Office of Asylum and Refugee Affairs. Slated to have authority over the field asylum offices, this office will administer and oversee the refugee program overseas and the bureau's humanitarian parole authority.

BUREAU OF IMMIGRATION ENFORCEMENT

Like its service counterpart, the Bureau of Immigration Enforcement will be a separate division headed by an executive commissioner who directly reports to the INS commissioner. This executive commissioner will oversee six different divisions, including the Border Patrol and Interior Enforcement, the Detention and Removal Division, and the International Division. The proposal divides the country into 9 enforcement areas, while retaining the 21 Border Patrol sectors currently in use.

Border Patrol and Interior Enforcement Division. The Border Patrol and Interior Enforcement Division would be the largest component of the enforcement operation. The division will be headed by a chief with authority over all law enforcement components in field offices, including personnel assigned to the 21 Border Patrol sectors, the 9 enforcement areas, and the INS intelligence program. Four deputy chiefs, one each for the Border Patrol, Investigations, Inspections, and Intelligence units, will support the division chief.

The deputy chief of the Border Patrol will oversee 21 deputy

chief patrol agents who, in turn, will oversee the daily operations of the Border Patrol sectors. This direct line of authority linking deputy chief patrol agents to oversight by the Border Patrol's deputy chief is a new element proposed by the plan, whose authors suggest that it will lead to improved law enforcement coordination and greater flexibility.

The other deputy chief positions will be staffed as follows:

- The deputy chief of Investigations will have direct line authority over special agents in charge (SACs), who oversee day-to-day law enforcement operations in the interior of the U.S. SACs will be assigned to the 9 enforcement areas.
- The deputy chief of Inspections will have direct authority over all INS ports of entry.
- The deputy chief of Intelligence will coordinate strategic intelligence to ensure efficient law enforcement.

Enforcement Areas. As noted above, the proposal creates 9 enforcement areas. Each will have designated an investigations office headed by a SAC and an inspections port area headed by an area port director. By locating these offices in the same enforcement areas and having them share administrative support, the INS hopes to facilitate their cooperation.

According to the proposal, coordination within enforcement areas among Border Patrol, Investigations, and Inspections should occur at the level of the local office head. For example, where a Border Patrol sector, an investigation office, and a port of entry are located in the same geographic area, coordination will be ensured by the deputy chief patrol agent, SAC, and area port director assigned there. Any failure to coordinate will be addressed by the chief of the Border Patrol and Interior Enforcement Division.

Enforcement field offices will manage four main smuggling corridors: the south Texas corridor, the west Texas/New Mexico corridor, the southern California corridor, and the Arizona corridor.

Detention and Removal. This division will be headed by a director who will have authority over INS detention facilities and operational standards nationwide. The proposal authors believe this arrangement will provide greater policy consistency throughout the INS.

International Division. This division will have oversight responsibility for foreign government training and liaison and enforcement functions. The division director will have authority over INS offices located overseas. The division will work in coordination with the Dept. of State, the U.S. Coast Guard, and foreign governments to monitor and disrupt the smuggling of persons and groups into the U.S. The overseas field offices will work closely with host countries, air and sea carriers, and international law enforcement organizations to investigate fraud and dismantle and deter criminal organizations operating both overseas and within the U.S.

The restructuring proposal also creates new, free-standing offices within the enforcement bureau. These new offices are the Office of the Ombudsman, the Interagency Liaison Office, and the Office of Quality Assurance.

Creation of Ombudsman. In response to criticism of INS abuses, the proposal establishes an Ombudsman Office in the Bureau of Immigration Enforcement. Generally, the office will provide the public with a means to communicate concerns about enforce-

ment activities and will seek to facilitate resolution of complaints before they reach the attention of Congress. The ombudsman will confidentially handle complaints, resolve problems, and forward allegations of serious misconduct, fraud, or abuse to the Office of Professional Responsibility. In addition, the proposal places an ombudsman representative in the Border Patrol and Interior Enforcement and the Detention and Removal divisions.

Office of Quality Assurance. This office will monitor the enforcement components to ensure consistency and fairness.

The Interagency Liaison Officer. The interagency liaison officer is another new position, and it is intended to facilitate the flow of information and cooperation with federal, state, and local law enforcement organizations. The plan devotes resources in each enforcement field office specifically intended to enhance information sharing.

AGENCY-WIDE OFFICES

In addition to the two main bureaus, the plan has provisions for a number of agency-wide offices. Some of the offices, such as the Office of Juvenile Affairs, are completely new while others have simply been reorganized. Still others remain virtually unchanged. The agency-wide offices are the Office of Juvenile Affairs; Office of Policy, Planning and Programs; Office of the General Counsel; Office of Professional Responsibility; Office of the Chief Information Officer; Office of Administration; Office of Congressional and Public Affairs; and Office of the Financial Officer.

Office of Juvenile Affairs. In response to mounting criticism regarding the INS's treatment of children in its custody, the proposal calls for a new central policy office on juvenile matters. Its aim is to centralize national policy to meet the needs of unaccompanied minors in INS custody. The office will seek to ensure that the INS treats all juveniles with whom it comes into contact with dignity, respect, and special concern. It will respond to the needs of juveniles (including but not limited to unaccompanied minors) in INS custody, coordinate services to juveniles in INS field offices, and ensure that juveniles found inadmissible or removable from the country are removed safely and correctly. The goals of INS policy toward minors include developing research-based best practices and service approaches, ensuring consistent application of policies and procedures, facilitating family reunification, and developing effective case management systems.

Office of Policy and Planning and Programs. This office will be responsible for developing policy and setting the INS's strategic direction. Policy and planning activities will be conducted in close collaboration with the INS commissioner. In addition to policy development, the office's responsibilities will include developing legislative requirements and strategies, directing long-range planning activities, analyzing the agency's official statistics, and managing the agency's performance planning and evaluation functions.

Office of the General Counsel. The structure and responsibilities of this office appear unchanged. The general counsel currently provides legal advice to the commissioner and field managers, represents the INS before the immigration courts and the Board of Immigration Appeals, and advises on the formulation of regulations and legislative proposals. The office also represents the INS in contested naturalization and denaturalization hear-

ings, labor-related cases, and employer sanctions and civil document fraud litigation. It also provides litigation support when the agency is a party to lawsuits in federal courts and assists in issuing reinstatement of removal orders, expedited removal orders, and administrative removal orders by field managers.

Office of the Information Officer. This office will consolidate the current Office of Information Resources Management, the Office of Records Services, the Website Management Unit, and the Office of Strategic Information and Technology Development. Through the information coordinator, the chief information officer will ensure that the bureaus maintain access to relevant enforcement data for adjudications and enforcement. The chief information officer will also develop links with other federal, state, local law enforcement and other relevant agencies.

Office of Professional Responsibility. Under the plan, the Office of Professional Responsibility would assume the functions now performed by the Office of Internal Audit. These include managing the organization's systems for resolving alleged employee misconduct, reviewing and evaluating the efficiency and effectiveness of programs, and ensuring proper liaison between the INS and outside audit and inspections organizations.

Chief Financial Officer. The Chief Financial Officer will be responsible for the INS's financial management.

Office of Administration. The Office of Administration will direct the agency's responsibilities for human resources, equal employment opportunity, procurement, facilities, property, and security. It will also be involved in health and safety standards, space acquisition, property management, and monitoring all capital assets.

Office of Congressional and Public Affairs. This office will provide liaison with Congress, the media, and external "stakeholders." Within the agency and with the Dept. of Justice and Office of Management and Budget, Congressional and Public Affairs will coordinate the development of legislation and agency views on pending legislation. The office will also advise the INS commissioner on legislative matters and coordinate hearings and meetings with congressional offices. This office will also provide congressional offices with responses to case-related inquiries.

RESTRUCTURING BUDGET AND STAFFING NEEDS

The separation of the agency's two primary functions will result in the need for increased staffing. However, because all field positions supporting the current regional office/district office structure will be eliminated, the net staffing increase required for restructuring is estimated to be 522 positions. This represents only a 1.5 percent increase over current staffing levels. Overall the estimated cost of restructuring is \$102,010,000.

TIMELINE

The plan proposes to complete restructuring in three phases. The initial phase will begin with headquarters and the establishment of the necessary support structure. The next two phases will focus on the organizational changes in the field. The fundamental reform of the INS and the splitting of the INS into two separate bureaus will be completed by FY 2003. Staff relocations and final office moves should be completed by FY 2004. The INS will use existing authority to accomplish near-term changes envisioned for the first phase within the FY 2002 budget. As

noted above, the INS commissioner has already appointed a director of restructuring, who will oversee the implementation of these changes. Most notably, the restructuring director will immediately begin to work with senior field and headquarters staff to design and implement changes to reporting relationships. Taking effect as soon as possible, these interim changes will be in place while plans for permanent restructuring are finalized and implementation is completed. The establishment of the Office of Juvenile Affairs at INS headquarters is also due to take place during this phase.

INITIATIVES

Introduced with the restructuring plan are a series of initiatives that are separate from the proposal but which the INS considers equally important to improve agency performance. Among other things, the initiatives seek to improve field offices' ability to provide personalized service, to enable applicants to file some immigration benefit applications on-line, and to expand successful local border patrol programs to locales across the country. Of greatest interest to many current applicants is the initiative to launch an aggressive backlog reduction effort in FY 2002. Through this initiative, the INS hopes to achieve a national average processing time of six months by the end of 2003 and, by the end of 2004, an average processing time of six months or less in every service office.

ATTORNEY GENERAL ADVISES FEDERAL AGENCIES TO WITHHOLD FOIA INFORMATION

— While noting his commitment to full compliance with the Freedom of Information Act (FOIA), Attorney General John Ashcroft has issued a memo to all heads of federal departments and agencies regarding the disclosure of materials in response to FOIA requests. Although the AG's Oct. 12, 2001, statement paid heed to the importance of a well-informed citizenry that holds government accountable, he also seemed to be suggesting that agencies may be less responsive to FOIA requests in the name of national security. The memo goes on to remind agency heads of the legal privileges available to them when responding to FOIA requests. The AG suggested that those privileges ensure that agencies can deliberate candidly without fear that their deliberations will be revealed to the public. Moreover, the attorney general assured agencies and departments that if they choose to withhold information, both the Office of Information and Privacy and the Civil Division of the Dept. of Justice (DOJ) would defend their decisions. This memo supersedes the DOJ's FOIA Memorandum of Oct. 4, 1993.

BIA: "UNUSUAL OR OUTSTANDING EQUITIES" REQUIREMENT NOT APPLICABLE TO LPR CANCELLATION ADJUDICATIONS

— The Board of Immigration Appeals has issued a precedent decision concerning the standard for adjudicating applications for cancellation of removal for lawful permanent residents under section 240A(a) of the Immigration and Nationality Act. The ruling finds that the requirement of "unusual or outstanding equities" that the BIA developed in adjudicating applications for waivers under former section 212(c) of the INA in cases involving serious criminal convictions does not apply to the adjudication of LPR cancellation

applications. Instead, in every case the respondent's positive equities must be balanced against the negative equities, including the seriousness of the conviction.

The decision was issued in the case of a Mexican national, a Mr. Sotelo, who adjusted to LPR status in 1990. In July 2000, he was convicted of possessing and passing fraudulent resident alien cards, failing to provide migrant workers with terms and conditions of employment, and aiding and abetting illegal entry. He received eight-month sentences for the first two offenses and a six-month sentence for the third offense, all to run concurrently.

The Immigration and Naturalization Service initiated removal proceedings based upon Sotelo's criminal convictions, and he applied for cancellation of removal. At his removal hearing he testified that during 1998 and 1999 he had transported smuggled undocumented immigrants for a fee, charged them for rent and transportation, and sold them fraudulent green cards and Social Security cards.

The immigration judge considered both positive and negative equities presented by Sotelo's case. In deciding to deny the cancellation application, the IJ stated that because of the criminal convictions Sotelo had to show "outstanding equities," and the judge concluded that he had failed to do so. Sotelo appealed this decision to the BIA.

In issuing its decision on the appeal, the BIA first discussed the standards applicable to the adjudication of cancellation of removal cases for LPRs. This form of relief for LPRs was established by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA). In *Matter of C-V-T-*, Int. Dec. 3342 (BIA 1998), the BIA held that the general standards that the BIA developed for exercising discretion under former INA section 212(c), as explained in *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978), apply to LPR cancellation cases. Under these standards, positive equities must be balanced against negative equities. As the BIA noted in *Marin*, in cases with only minor adverse factors, the equities inherent in an applicant's meeting the statute's eligibility requirements "may be sufficient in and of themselves to warrant favorable discretionary action." *Id.* at 585. However, the positive equities that an applicant must present "will depend in each case on the nature and circumstances of the ground of [removability] sought waived and on the presence of any additional adverse matters" [sic]. *Id.*

In a number of 212(c) cases, the BIA found that a respondent who had committed a serious criminal offense must demonstrate "unusual or outstanding equities" in order to merit relief. *Matter of Buscemi*, 19 I. & N. Dec. 628 (BIA 1988); *Matter of Edwards*, 20 I. & N. Dec. 628 (BIA 1988). In *Edwards*, the BIA clarified that this requirement should not be considered a basis for avoiding full consideration of favorable factors and that a complete review of such factors is necessary in every case. *Id.* at 196.

In *C-V-T-*, the BIA questioned whether the "outstanding equities" requirement developed in exercising discretion under former INA section 212(c) has any relevance for LPR cancellation of removal cases, given the fact that the IIRIRA broadly expanded the definition of "aggravated felony." The BIA noted that because aggravated felons are not eligible for LPR cancellation, none of the immigrants to whom the BIA denied 212(c) relief because they lacked outstanding equities would even have been eligible for cancellation had they been in removal proceedings.

In the instant case, the BIA concluded that "we will not apply a threshold test in cancellation of removal cases." Rather, in every case the favorable and adverse factors must be weighed, to determine whether the "totality of the evidence" warrants a favorable exercise of discretion."

Examining the particular factors present in this case, the BIA concluded that the favorable factors do not outweigh the adverse ones. The recent, serious criminal convictions involved repeated transactions, constituting a strong adverse factor. The positive equities were that the respondent has been an LPR since 1990, has petitioned to immigrate his Mexican wife and three children, has another child who is a U.S. citizen, born in 1990, and has two brothers who are U.S. citizens. There were also several affidavits submitted from relatives and friends attesting to the respondent's favorable character.

In this case there was also evidence that the respondent had an outstanding warrant for arrest in Mexico on a charge of murder. The IJ had refused to give any weight to the warrant as a factor in exercising discretion. On appeal, the respondent argued that the warrant could not be considered because the INS did not appeal the IJ's decision. The BIA rejected this argument, finding that because it reviews the record de novo it may review all record evidence. However, the BIA refused to consider the warrant as an adverse factor because there was no conviction.

Because the BIA agreed with the IJ that the respondent did not merit a favorable exercise of discretion, it ordered the appeal dismissed.

Matter of Sotelo-Sotelo,
23 I. & N. Dec. 201, Int. Dec. 3460 (BIA 2001).

INS PUBLISHES CORRECTED ADDRESS FOR WALTERS CLASS MEMBERS REQUESTING REFUNDS

The Immigration and Naturalization Service has published a notice correcting the address to which class members in *Walters, et al. v. Reno, et al.* should send refund requests. Under the terms of the settlement reached in the litigation, class members who paid civil monetary penalties for violations of Immigration and Nationality Act section 274C can request refunds. According to the agency, a Federal Register notice regarding the settlement published on Sept. 20, 2001, contained an incorrect address. *Walters* class members requesting refunds should, therefore, mail the request to:

INS Debt Management Center
188 Harvest Lane
Williston, VT 05495-7554

66 Fed. Reg. 60,223 (Dec. 3, 2001).

INS TO REQUIRE USE OF MOST RECENT VERSION OF FORM N-400 APPLICATION FOR NATURALIZATION

The Immigration and Naturalization Service has issued a Federal Register notice to advise the public that, as of Jan. 1, 2002, the agency will cease accepting versions of the Application for Naturalization, Form N-400, issued prior to the most recent version. The most recent version bears an edition date of May 31, 2001, and was first available for filing on Aug. 1, 2001. The notice explains that the most recent version of Form N-400 can be obtained by calling the INS Forms Line at 1-800-870-3676. It also may be viewed, filled, and printed

on the INS web site at <http://www.ins.usdoj.gov>.

66 Fed. Reg. 57,737 (Nov. 16, 2001).

Litigation

6TH CIRCUIT RULES REINSTATEMENT OF REMOVAL NOT APPLICABLE WHERE REENTRY OCCURRED PRIOR TO APRIL 1, 1997

The U.S. Court of Appeals for the Sixth Circuit has ruled that the Immigration and Naturalization Service cannot use section 241(a)(5) of the Immigration and Nationality Act to "reinstatement" the deportation orders of immigrants who were previously deported and then reentered the United States illegally, where the individual's reentry occurred prior to Apr. 1, 1997.

Section 241(a)(5) provides that where the attorney general finds that an immigrant has reentered the U.S. illegally after having left the country under an order of removal, the prior removal order is reinstated and may not be reopened or reviewed. Based on an analysis of various provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the court concluded that the reinstatement provision does not apply to reentries that occurred prior to the Apr. 1, 1997, effective date of section 241(a)(5). With this ruling, both the Sixth and Ninth Circuits now have held that the statute does not apply to pre-Apr. 1, 1997, reentries, while the Fourth Circuit has ruled to the contrary (see "9th Circuit Rules on Reinstatement of Removal," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2001, p. 9).

Bejjani v. INS, ___ F.3d ___, No. 01-3117
(9th Cir. Nov. 14, 2001).

9TH CIRCUIT REVERSES BIA'S DENIAL OF CONVENTION AGAINST TORTURE CLAIM

The Ninth Circuit Court of Appeals has reversed the Board of Immigration Appeals' denial of a Convention Against Torture (CAT) claim made by an Iraqi man who claimed that Iraqi officials had persecuted him. Following the last of his three arrests, Mr. Al-Saher, the petitioner in this case, managed to flee to the U.S., where he was placed in removal proceedings by the Immigration and Naturalization Service.

According to his testimony, Al-Saher served in the Iraqi military and later worked with the military as a civilian government worker. When he initially applied for military service, he stated that he was a Sunni Muslim from Al Barba despite the fact that he was actually a Shiite. He later stated he had misrepresented himself because of discrimination against Shiite Muslims in Iraq, whose population is majority Sunni. His misrepresentations were later discovered when his father identified the family as Shiite on a census form.

Al-Saher was arrested in 1997 for having lied about his religion and place of birth. During his month-long detention, he was interrogated and severely beaten. At his removal hearing, he described being blindfolded with his hands tied behind his back and kicked, punched, and stricken with a thick electric cable until he could no longer stand on his feet. Al-Saher's father ultimately paid a bribe to an official in Sadaam Hussein's office, and Al-Saher was released. He was warned that if he ever disclosed what happened to him, he would be arrested again.

Al-Saher returned to his job and was later instructed to build a fence in a sensitive location near President Hussein. When Al-Saher asked exactly where the fence was to be built, he was arrested again. This time, he was subjected to even harsher beatings and burned with cigarettes. Again, through family intervention, he was released.

In 1998 Al-Saher was arrested a third time because officials heard him say that elite Iraqis eat well while the poor go hungry. Al-Saher and his friends were detained for five to six days, but he was not beaten. He managed to escape and fled to the U.S.

At his removal hearing, he applied for asylum, withholding of removal, and CAT protection. In order to gain asylum, Al-Saher needed to show that he was persecuted on account one of five grounds enumerated in the Immigration and Nationality Act: race, religion, nationality, political opinion, or membership in a particular social group. After the immigration judge denied his claims, Al-Saher appealed to the BIA, which, despite finding Al-Saher credible, also concluded that he had not been persecuted on account of one of the five grounds.

On appeal, Al-Saher conceded that neither of his first two arrests were made on account of one of the five grounds. He argued, however, that he was arrested a third time because the statements he made about elite and poor Iraqis led Iraqi officials to impute to him an antigovernment political opinion. Although the Ninth Circuit agreed with Al-Saher, it concluded that he had not been persecuted following his third arrest. The appeals court also agreed with the BIA that Al-Saher failed to show a well-founded fear of future persecution on account of one of the five grounds.

However, the Ninth Circuit disagreed with the BIA's finding regarding Al-Saher's CAT claim. Article 3 of the CAT states that no signatory state may expel, return, or extradite a person to a country where there are substantial grounds for believing that he would be in danger of torture. The burden is on the CAT applicant to prove that it is more likely than not that he will be tortured if removed to the country of removal. However, he need not show that he would be tortured on account of a protected ground. The BIA had concluded that Al-Saher's experiences did not amount to torture. Holding that the suffering he endured cannot be considered "inherent or incidental to lawful sanctions," the Ninth Circuit instead ruled that it resulted from actions specifically intended to inflict severe physical pain. Moreover, the Ninth Circuit held that Al-Saher had presented evidence that he was likely to be tortured in the future. Thus, the court held that Al-Saher was entitled to withholding of removal under the CAT and accordingly remanded the case to the BIA to issue such an order.

Al-Saher v. INS, 268 F.3d 1143, No. 99-71308
(9th Cir. Oct. 23, 2001).

9TH CIRCUIT RULES LPR CONTESTING DEPORTABILITY NOT ELIGIBLE FOR 212(h) WAIVER

– The U.S. Court of Appeals for the Ninth Circuit has ruled that a lawful permanent resident in removal proceedings may not obtain a 212(h) waiver to avoid deportability. The court rejected the respondent's argument that equal protection requires that 212(h) waivers be available to LPRs seeking relief from removal on the same basis as they are available to applicants for admission or adjustment of status. The decision

issued on a petition for review of a removal order entered by the Board of Immigration Appeals.

The respondent in this case, a Mr. Finau, is a national of Tonga who was admitted to the U.S. as an LPR in 1988. In 1989 and 1992, he was convicted of petty theft. In 1998, the Immigration and Naturalization Service initiated removal proceedings against Finau, charging him with being deportable because he was convicted of two crimes of moral turpitude. To defend against his removal, Finau sought to apply for a waiver under section 212(h) of the Immigration and Nationality Act, which provides for a discretionary waiver of certain criminal grounds of inadmissibility, including the ground for having committed two crimes of moral turpitude. An immigration judge, and ultimately the BIA, found that Finau was not eligible for a 212(h) waiver because he was deportable rather than inadmissible. Finau then filed a petition for review with the court of appeals.

On appeal, a panel of the Ninth Circuit dismissed the case on jurisdictional grounds, finding review barred by INA section 242(a)(2)(C), which bars appellate review of petitions for review filed by individuals who are deportable or inadmissible because of certain criminal convictions. Finau then filed a petition for rehearing, the INS conceded that the court has jurisdiction to consider Finau's constitutional challenge, and the court reasigned the case to a new panel.

In its decision, the new panel rejected Finau's argument that section 212(h) impermissibly treats similarly situated classes of individuals differently. The panel acknowledged that, under its reading of the statute, 212(h) waivers may be available to "inadmissible" aliens but not to "deportable" aliens. However, the panel found the difference between inadmissibility and deportability to be so "long-standing and fundamental" as to preclude considering these two classifications as similarly situated. The panel did not discuss *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995), in which the Eleventh Circuit ruled that equal protection requires that 212(h) relief be available to a deportable LPR.

The petitioner is expected to file a petition for rehearing.

Finau v. INS, ___ F.3d ___, No. 00-70238
(9th Cir. Oct. 31, 2001).

PA DISTRICT COURT DENIES INS MOTION TO DISMISS REVIEW OF AGENCY'S REFUSAL TO CONSENT IN SPECIAL IMMIGRANT JUVENILE CASE

– A federal court in eastern Pennsylvania has denied the Immigration and Naturalization Service's motion to dismiss an 11 year-old Ghanaian boy's complaint requesting review of the agency's refusal to consent to a dependency proceeding in his special immigrant juvenile (SIJ) case. The INS discovered Yeboah at John F. Kennedy Airport in New York after he arrived without parents, guardian, or travel documents. The INS placed him in custody and sought to return him to Ghana. Yeboah then applied for SIJ status.

SIJ status is relief available to abused and neglected children who are eligible for long-term foster care and declared dependent by a court. An administrative or judicial proceeding must also determine that it is not in their best interest to be returned to their homelands. In cases like Yeboah's, a dependency court can issue a dependency order only if the INS consents to a state juvenile court's jurisdiction to do so. After the INS district director

refused to consent, Yeboah sought relief in district court by filing a complaint. Arguing that the decision to consent to a dependency court's jurisdiction is in the attorney general's exclusive discretion, the INS moved to dismiss his case based on the court's lack of subject matter jurisdiction.

The district court began its analysis by noting that the Administrative Procedure Act (APA) provides for comprehensive judicial review of agency actions. The INS had argued that, despite the broad presumption of reviewability, its action fit within one of the APA's two exceptions precluding judicial review: it contended that its decision to withhold consent constituted action that "is committed to agency discretion by law." The district court disagreed.

In reaching its ruling, the district court assessed whether the statute providing for SIJ status met the standard articulated by the U.S. Supreme Court regarding the applicability of the APA's "committed to agency discretion by law" exception. That standard limits the exception to cases where the statute at issue is "drawn in such broad terms that in a given case there is no law to apply." In other words, decision-making authority is considered "committed" to the agency's nonreviewable judgment only if the statute is drawn so broadly that it does not contain a meaningful standard against which to judge an agency's action. The district court then reviewed *Chong v. Director, United States Information Agency*, 821 F.2d 171 (3d Cir. 1987). There, the Third Circuit found that the existence of regulations delineating procedures to be followed by the agency provided "sufficient guidance to make possible judicial review under an abuse of discretion standard." Following *Chong*, in Yeboah's case, the district court found that the INS had adopted internal procedures providing a standard by which its discretionary actions could be judged. Therefore, the APA exception cited by the INS did not apply. Accordingly, the court denied the INS's motion to dismiss Yeboah's complaint.

Yeboah v. INS, 2001 U.S. Dist. LEXIS 17360, No.01-CV-3337 (E.D. PA Oct. 26, 2001).

9TH CIRCUIT RULES REINSTATEMENT STATUTE BARS CHALLENGE TO PRIOR DEPORTATION ORDER THAT WAS BASED ON RETROACTIVE APPLICATION OF AEDPA

– The U.S. Court of Appeals for the Ninth Circuit has issued a decision upholding a district court's denial of a petition for writ of habeas corpus to review a "reinstated" removal order. A panel of the court found that the reinstatement statute bars challenges to the original removal order and that it is not unconstitutional to do so where the petitioner had the opportunity to appeal the original order but failed to do so. In this case the immigration judge in the original deportation case had not allowed the petitioner to apply for a 212(c) waiver because the IJ considered that, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the petitioner's convictions barred him from this relief. Although the Ninth Circuit ultimately ruled, in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999), that AEDPA does not apply to cases that were pending when the AEDPA was enacted, the court in this case ruled that the deportation order was not unlawful. The court reasoned that *Magana-Pizano* announced a new rule of law, and new rules do not apply to cases that are subject only to collateral review.

In this case, the petitioner, a Mr. Alvarenga-Villalobos, is a

lawful permanent resident with criminal convictions who was served with an Order to Show Cause in June 1993. Apparently he did not have a hearing until June 1997, at which time the IJ ruled that because of the AEDPA he was not eligible for 212(c) relief and ordered him deported. He did not appeal—he was detained and was informed that he could not be released because of the mandatory detention provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). He was therefore deported in June 1997. He returned to the U.S. illegally in November 1997 and two years later ended up in proceedings again. The Immigration and Naturalization Service then reinstated the prior deportation order, and the petitioner filed a habeas petition in an effort to challenge reinstatement.

The panel decision does not discuss the court's jurisdiction. Under *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001), a petition for review rather than a habeas petition is the proper procedure to obtain review of a reinstatement case. However, the transfer procedure that the court adopted in *Castro-Cortez* (treating the habeas petition as if it had been filed as a petition for review with the court of appeals, given the unsettled state of the law at the time) would also be appropriate in this case.

On the merits, the petitioner contended that under *Magana-Pizano* his deportation was unlawful. He would have been eligible for 212(c) relief but for the IJ's impermissibly retroactive application of the AEDPA to his case. However, the panel held that the reinstatement statute, INA section 241(a)(5), precludes any challenge to the prior deportation order. The panel found there was no constitutional infirmity in applying this preclusion to the petitioner because in his case he could have appealed the immigration judge's decision but did not do so. The panel also found that the prior removal order was not unlawful, reasoning that because the case was not on direct review at the time that *Magana-Pizano* was decided, and a new rule of law does not apply retroactively on collateral review, the prior order should be considered lawful.

The petitioner is expected to file a petition for rehearing of the decision.

Alvarenga-Villalobos v. Ashcroft,
__ F.3d __, No. 00-17525 (9th Cir. Nov. 26, 2001).

UPDATE TO CSS AND LULAC CLASS MEMBERS, ATTORNEYS, AND ADVOCATES, by Peter Schey, * Center for Human Rights and Constitutional Law

– On Dec. 10, 2001, the federal district court in Sacramento held a hearing in the *Catholic Social Services (CSS)* case to deal with the plaintiffs' motion to amend the complaint to obtain a remedy for class members who never applied for work authorization. The court recently reinstated the *CSS I* case, which was dismissed in 1999 after enactment of section 377 of the Immigration and Nationality Act.

We at the Center for Human Rights and Constitutional Law (CHRCL) recently have had several discussions with the government about the future of CSS, as well as about the LULAC/*Newman* case and the LIFE Act. During these discussions, we have been told that the Immigration and Naturalization Service is considering issuing final regulations implementing the LIFE Act in the next few months and extending for another year the period during which persons who registered as class members in CSS or LULAC may apply for adjustment under the LIFE Act. Also, we believe

that the final regulations will resolve several problems class members have faced under the interim regulations that are now in effect. We believe applications filed after the final regulations are issued may be treated more favorably than applications being filed now under the interim regulations.

We plan, in the near future, to file a motion for final relief in the *CSS* case. We will ask the court to issue a final order, much like the final order it issued in the summer of 1988, requiring the following: (1) that the INS publicize the availability of final relief; (2) that the INS accept and adjudicate applications under the Immigration Reform and Control Act of 1986, using IRCA standards that appear to be more favorable than those provided for under the LIFE Act (at least as interpreted by the INS); and (3) that a mechanism be provided so that the INS's compliance can be monitored by the court (to avoid arbitrary denials of legalization, a feature not available in the LIFE Act).

The *LULAC/Newman* case is still pending before the Ninth Circuit Court of Appeals. However, we intend to file a motion soon with the court of appeals asking that the case be returned to the federal district court, where we will apply for a remedy for Group 2 class members (those who visited an INS or "Qualified Designated Entity" office during the 1987-88 application period without a complete application in hand and who were turned away).

Given these developments, here is what we recommend for class members and their advocates:

1. If a class member has work authorization and has not yet filed under the LIFE Act, it might be beneficial to wait to file until the INS issues the final LIFE Act regulations. We believe the INS will extend work authorization already issued under *CSS* or *LULAC/Newman*. We believe the final regulations will be more generous than the interim regulations in several respects (e.g., the interim LIFE Act regulations permit only "brief, casual and innocent" absences from the U.S. for 30 days or less, but there is no such limit under IRCA legalization and the *CSS* district court's April 1988 summary judgment order). Class members may also want to see what kind of final relief order the district court is willing to issue in the *CSS* case, something we may know in the next couple of months.

2. Class members who have already applied under the LIFE Act should have an attorney review their applications (if they can afford an attorney or if they have access to a local free legal services program) to make sure that the application is as strong as possible, especially proving residence in the United States between Jan. 1, 1982, and May 4, 1988. This is particularly true if (1) the applicant does not have hard evidence of residence for 1982 (we consider hard evidence to be documents such as school records, a visa, checking account, medical records, driver's license, etc.), or (2) the class member had absences between 1982 and May 1988 of more than 30 days (without INS advance parole). Applications without such hard evidence of residence during 1982 and the early years (1982-85) must be supported by detailed affidavits from family members and friends showing that the applicant resided in the U.S. from January 1982 to May 1988. We are recommending that applicants try to submit about ten such affidavits. We can provide applicants with a sample affidavit. This can be obtained by contacting Silvia at CHRCL (213-388-8693, ext. 107) or via e-mail by contacting me at

pschey@centerforhumanrights.org

3. Class members who used to have work authorization but were unable to obtain an extension of it in 2001 should contact me by e-mail or send a letter and a copy of their file to me at the Center for Human Rights, 256 S. Occidental Blvd., Los Angeles, CA 90057. We can try to help such class members reobtain work authorization. If the work authorization cannot be obtained and is needed, the class member should probably then apply under the LIFE Act before the final regulations are issued or a global settlement reached.

4. Class members who have never obtained work authorization and who need it should probably prepare and file their LIFE Act applications now. However, if possible, such class members should have a lawyer help them prepare their applications.

5. Class members who have applied under the LIFE Act and received denials or a Notice of Intent to Deny should e-mail me at pschey@centerforhumanrights.org. They should also make a complete copy of their file, including (1) their original application for work authorization, (2) copies of their work authorization (if they were granted work authorization) and interview notices, and (3) their LIFE Act application, and mail these documents to me at the Center for Human Rights (address above). They can also call me at 213-388-8693, ext. 104, and if I am not available leave a message (clearly spell your name and slowly state your telephone number, and explain that you have received a denial or a Notice of Intent to Deny).

6. Class members who filed Legalization Questionnaire forms and have not yet received a decision should expect decisions in the next few months. The Vermont processing center has processed about 7,000 cases and is working on about 6,500 remaining cases. The approval rate is now about 30 percent.

7. Class members whose Legalization Questionnaire forms were approved and who filed legalization applications with the INS processing center in Texas should be patient (the INS says it has to work out problems with its computers before these cases can be processed).

In summary, if we are successful in winning a final relief order in *CSS*, class members may be able to file applications for legalization under *CSS*, under the LIFE Act, or both.

If we are successful in getting a final relief order for Group 2 in the *LULAC/Newman* case (in which Group 1 front-desked class members already had the opportunity to apply for legalization), then Group 2 class members may be able to file applications for legalization under *LULAC/Newman*, under the LIFE Act, or both.

People who have access to the internet can also check the CHRCL's web page at www.centerforhumanrights.org for further updates.

**(Peter Schey is Director of the Center for Human Rights and Constitutional Law and counsel for the plaintiffs in the CSS and Newman cases.)*

Employment Issues

NEWLY ENACTED CITIZENSHIP REQUIREMENT TO DISPLACE THOUSANDS OF AIRPORT SECURITY SCREENERS – The Aviation and Transportation Security Act of 2001 (ATSA), which the president signed

into law on Nov. 19, 2001, requires, among other things, that all airport security screeners in the United States be U.S. citizens. Originally, the Senate bill, which passed the Senate by a unanimous vote, contained a requirement that, in order to be eligible for the job of security screener, a person would have to have been a citizen or national of the U.S. for at least five years. The House of Representatives' version also contained the citizenship requirement, though without the "five years" element. It is this latter provision that is now the law. Advocates estimate that about 60 to 80 percent of current airport screeners at the nation's largest airports are non-U.S. citizens who will be displaced by the new requirement.

The ATSA created the Transportation Security Administration (TSA) under the Dept. of Transportation, and President George W. Bush has nominated John W. Magaw to head the TSA as under secretary of Transportation for security. The new citizenship requirement is found in Section 111 of the ATSA, which amends Section 44935 of Title 49 relating to the employment standards and training of security personnel. Under Section 111, the under secretary for security is to establish, within 30 days of enactment of the law, the qualifications for all security screening personnel who are now considered federal employees. In addition to being citizens of the U.S., screeners must undergo an employment investigation, including a criminal background check, and have a high school diploma or general equivalency diploma, unless the under secretary determines that the potential screener has sufficient experience to perform the required duties. In addition, screeners must have a level of English proficiency sufficient to carry out written and oral instructions, to "read English language identification media, credentials, airline tickets, and labels on items normally encountered in the screening process; and . . . [to] write incident reports and statements and log entries into security records."

The under secretary will have the authority to set all of the criteria for hiring, firing, training, testing, and supervising security screeners. Each screener will also be subject to an annual performance review, during which the screener must demonstrate that she or he meets all of the job qualifications and standards and can continue to carry out those functions "courteously, vigilantly, and effectively."

Section 110(c) of the ATSA requires that the TSA deploy a "sufficient" number of security personnel to all airports within one year of the law's enactment (Nov. 19, 2002), and the under secretary must transmit a certification to Congress that this requirement has been met. The under secretary must first issue a report within six months of the enactment date to the appropriate congressional committees outlining the TSA's plans and timeline for the deployment of all federal screeners, security managers, law enforcement officers, and other security personnel.

While Section 108 of the ATSA does provide for five airports in the country to apply for and participate in a security screening pilot program, in which security screening personnel will not be federal employees but instead will be employed by private companies, the screeners in the pilot program must still meet all the other requirements provided for by the act, including the citizenship requirement. The under secretary will still provide federal government supervisors to oversee all of the screening conducted under the pilot program. The private company must use the same

eligibility criteria and provide its screeners with the same level of compensation and related employment benefits as federal screeners at other airports will receive. Moreover, the under secretary may enter into a contract with a private screening company only after he determines and certifies to Congress that the private company is owned and controlled by a U.S. citizen.

Several bills have already been introduced to try to address the issue of the impending displacement of screeners who are currently on the job. The first bill, H.R. 3416, was introduced by Rep. Patsy T. Mink of Hawaii on Dec. 5, 2001, and would allow the hiring of security screeners who are lawful permanent residents and who filed an application for naturalization prior to Sept. 11, 2001. The second bill, S. 1829, was introduced by Sen. Diane Feinstein of California, along with Senators Hollings and Boxer, on Dec. 14, 2001. This bill, the Airport Security Personnel Protection Act, seeks to protect the jobs of current screeners by providing the under secretary with the authority to continue employing or to rehire individuals who were screeners on the date the ATSA was enacted and who are LPRs in the process of becoming naturalized citizens. It would also require the attorney general to expedite the naturalization process for these airport security screeners.

Under this proposal, the attorney general would have to certify that an individual is an LPR who has either a pending naturalization application or is within one year of being eligible to apply for naturalization and has filed a declaration of intent to become a U.S. citizen. The individual would also need to meet all other eligibility criteria set out in the ATSA. The Senate bill also sets forth deadlines to expedite the naturalization process for these workers. For example, it would require the attorney general to complete the process within 180 days of the enactment of the ATSA for those security screeners who had an application pending on the ATSA's date of enactment, or to complete the process within 180 days of the Immigration and Naturalization Service's receipt of a naturalization application for any security screener who applies for naturalization after the date of enactment. Rep. Hilda Solis of California has also introduced legislation (H.R. 3505) into the House of Representatives that is identical to the Airport Security Personnel Protection Act.

While neither of these bills addresses the underlying citizenship requirement, advocates will continue to work toward a full repeal of the requirement when Congress returns in next session.

WORKERS PROTECTED FROM FURTHER RETALIATION AND THREATS OF BEING REPORTED TO THE INS

— A federal judge with the U.S. District Court for the Southern District of New York has granted a group of delivery workers a preliminary injunction prohibiting the defendant employer from further threatening the workers with being reported to the Immigration and Naturalization Service.

After two West African immigrant workers testified in a state court proceeding that their employer owed them unpaid wages and overtime pay, they were fired from their jobs. These workers are part of a class action lawsuit in New York seeking to recover unpaid wages (see "Court Certifies Low-Wage Delivery Workers' Class Action," IMMIGRANTS' RIGHTS UPDATE, June 29, 2001, p. 13). Approximately one week after the hearing, the defendant began requiring that all employees fill out an employment appli-

cation form that contained blanks for passport or visa numbers. The workers were all required to bring copies of their passports or visas. Employees who refused to fill out the application risked not being paid. At least three other delivery workers were also fired. The defendant subsequently advised the plaintiffs' counsel that he was making a list of all those workers who were undocumented in order to turn them in to the INS.

The federal district court ordered the five workers who were fired reinstated with full back pay, holding that these firings were retaliatory in violation of section 215(a)(3) of the Fair Labor Standards Act of 1938 (FLSA). The judge also found that the firing of these five workers caused irreparable harm to their livelihood and that the threat of being fired also had irreparable chilling effect for the other class members who were willing to pursue their claims against the defendant. The court found that the employer was using the INS "as a terrorizing and intimidating weapon against the plaintiffs." The judge rejected the defendant's arguments that these workers are independent contractors and not its employees. However, the court cited the fact that if the workers were indeed independent contractors, the defendant had no right to inquire into their immigration status. According to the court, the fact that the employer was attempting "to use the INS as a terrorizing weapon" shows that the defendant was either indifferent to the FLSA or had neglected to comply with the requirement under the Immigration Reform and Control Act of 1986 that it verify the employment eligibility of employees when they were first hired.

The court found the defendant's actions "unlawful and reprehensible" and issued an order prohibiting the defendant from retaliating in any way against any of the plaintiffs or class members. In addition, the court enjoined the defendant and any of its attorneys, employees, or agents from directly contacting the INS about any of the class members.

Ansoumana, et al. v. Gristede's Operating Corp. et al.,
No. 00 CV 0253 (AKH)(S.D.N.Y. Nov. 28, 2001)
(order granting preliminary injunction).

UNION REACHES SETTLEMENT ON BEHALF OF WORKERS FIRED BASED ON SOCIAL SECURITY NO-MATCH LETTERS – The Hotel Employees and Restaurant Employees (HERE), Local 2, has reached a settlement agreement with the San Francisco Central Travelodge Joint Venture that provides seven housekeeping employees with \$50,000 in back pay and conditional reinstatement.

Travelodge had fired the seven Latina employees on Apr. 17, 1999, after it received "no-match" letters from the Social Security Administration (SSA) stating that the women's names and the Social Security numbers they had provided to Travelodge did not match the SSA's database. The terminated employees filed a grievance and subsequently arbitrated the issue, alleging that their termination violated their union contract's prohibition against union members being fired without "just cause." The employees were successful in the arbitration, and the arbitrator issued a decision on May 3, 2000, finding that Travelodge's firing of the workers based solely on its receipt of the SSA no-match letters was indeed a violation of HERE Local 2's contract. The arbitrator ordered the workers reinstated with full back pay.

Because the parties were not able to reach an agreement as to

the remedies owed to the seven employees, both parties submitted further briefs to the arbitrator. Particularly, the employer argued that it could not reinstate the workers because, after it terminated the employees, it contacted the Immigration and Naturalization Service to verify the validity of the immigration documents the workers presented to Travelodge at the time they were hired. Travelodge claimed that the INS agent confirmed that some of the documents were not legitimate. It argued that since it now had constructive knowledge that some of the workers were undocumented, it could not rehire them. Likewise, Travelodge asserted that workers are not entitled to back pay for any period of time they are employed while being undocumented. The arbitrator rejected both of these arguments in her decision of Dec. 27, 2000, affirming her earlier award of full reinstatement and back pay to all seven workers.

Travelodge subsequently petitioned the United States District Court for the Northern District of California in San Francisco to vacate the arbitrator's award or to modify it. The parties reached an agreement in the matter, which, in addition to providing the seven workers with the lump sum back pay award, also gave them six months to decide if they want to return to work. If they decide to return, they must establish that they are eligible to be employed in the U.S. before they can be reinstated. Once they are reinstated, the employment eligibility-related information they provide to the Travelodge at that time will be the only such documentation kept in their file in order to minimize any risk of their being charged with document fraud for previously using false documents. Since a settlement was reached, the underlying arbitrator's decisions are still standing and thus can be used by other advocates facing similar issues.

San Francisco Cent. Travelodge Joint Venture v. Hotel Employees and Restaurant Employees Union, Local 2,
No. C-01-1371 (MMC)(N.D. Cal. filed Apr. 6, 2001).

Immigrants & Welfare Update

IMMIGRANT FOOD STAMP RESTORATION INCLUDED IN SENATE FARM BILL TO BE CONSIDERED IN JANUARY – The Agriculture, Conservation, and Rural Enhancement Act of 2001 (S. 1731), which restores federal food stamp eligibility to a significant number of immigrants and includes \$6.2 billion in food stamp improvements over 10 years, was debated on the Senate floor during the month of December. Because the Senate did not reach agreement on the Farm Bill, the debate will continue after Congress reconvenes on Jan. 23, 2002.

The bill, sponsored by Sen. Tom Harkin (D-IA), would make the following changes in food stamp eligibility for "qualified" immigrants:

- Lawful permanent residents (LPRs) with credit for 16 quarters of work history in the U.S. would be allowed eligibility for food stamps. Currently, LPRs must have 40 quarters of work history to qualify. Immigrants can claim credit for a spouse's work, or for work performed by a parent while the immigrant was under 18 years old (including periods before birth).
- Qualified immigrant children would be allowed eligibility, re-

ardless of when they entered the U.S. Currently, only children who were lawfully present in the U.S. on Aug. 22, 1996, are eligible.

- Immigrants receiving disability-related benefits would be allowed eligibility, regardless of when they entered the U.S. Currently these immigrants must have been lawfully present in the U.S. on Aug. 22, 1996, to qualify under this exemption.

- Refugees, asylees, and others fleeing persecution would remain eligible for food stamps after the expiration of the initial seven-year period of eligibility which current law grants to them.

The immigrant-related provisions represent almost 20 percent (\$1.125 billion over 10 years) of the total food stamp spending in the bill. On Dec. 12, 2001, Sen. Richard Lugar (R-IN) offered an amendment to the Farm Bill that would have restored food stamp eligibility to a broader group of immigrants. Senator Lugar's proposal would have allowed all immigrants who either (1) entered the U.S. before Aug. 22, 1996, or (2) entered the U.S. on or after Aug. 22, 1996, and have been in qualified immigrant status for five years, to be eligible for food stamps. Lugar's proposal was tabled by a vote of 70-30, thereby ending all debate on the amendment.

Several other senators submitted amendments to the immigrant provisions of the bill. Sen. Richard Durbin (D-IL), for example, drafted an amendment that would increase food stamp funding by \$1.4 billion over 10 years. The amendment would also allow lawfully residing immigrant seniors to be eligible for food stamps, regardless of when they entered the United States. Currently, only seniors who were lawfully present in the U.S. on Aug. 22, 1996 (and were 65 years or older on that date) are eligible. Sen. Phil Gramm (R-TX) submitted an amendment that would strip the immigrant restorations from the bill. These amendments have not been debated.

Because the version of the Farm Bill passed by the House of Representatives (H.R. 4626) does not include restorations of benefits to immigrants, it is crucial that the Senate bill retain these provisions. An attempt by Senator Hutchinson (R-AR) to substitute the House language into the Senate bill was unsuccessful. As this issue goes to print, it appears likely that the Senate will continue debating the bill after it reconvenes on Jan. 23, 2002. The House and Senate bills will then go to a conference committee.

OMB REQUESTS INFORMATION ON COSTS OF IMPLEMENTING EXECUTIVE ORDER ON SERVICES FOR LEP PERSONS – The Office of Management and Budget (OMB) has published a request for information on the costs of implementing Executive Order 13166. Signed by former President Bill Clinton, the executive order was issued to ensure that persons with limited English proficiency (LEP) have meaningful access to federally funded programs and services. This purpose is consistent with the requirements of Title VI of the Civil Rights Act, which prohibits discrimination based on national origin. The executive order was published at 65 Fed. Reg. 50,121–22 (Aug. 16, 2000).

The executive order required federal agencies that provide

federal financial assistance to develop guidance to be followed by federal funds recipients in providing meaningful access to LEP persons. The order also required the agencies to examine their own activities and develop internal plans for providing meaningful access to LEP persons (see "DOJ Issues Policy Guidance on Discrimination against Persons with Limited English Proficiency," IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 2000, p. 12).

Critics of the executive order have claimed that its implementation will be excessively costly and have orchestrated attempts to rescind it or scale back its scope (see "Clinton Order Improving Language Access Threatened; Advocates Urge President Bush Not to Rescind or Scale Back Order," IMMIGRANTS' RIGHTS UPDATE, May 10, 2001, p. 12, and "Justice Dept. Confirms Validity of Clinton's Order Regarding Access to Services for Limited English Proficient Persons," IMMIGRANTS' RIGHTS UPDATE, Nov. 16, 2001, p. 14). Noting the profound long-term consequences of denying critical services, supporters of the order have asserted that the benefits of providing access far outweigh the costs of implementation.

The Treasury-Postal Appropriations bill for 2002 (P.L. 107-67) directs the OMB to assess the total costs and benefits of implementing the executive order and to submit a report to the House Appropriations Committee within 120 days of completing the assessment. The language requiring the OMB study was inserted at the insistence of Rep. Ernest Istook (R-OK), who has led several of the attempts to undermine or repeal the executive order. Through its request, the OMB plans to collect information that will help develop meaningful estimates to report to Congress.

The OMB request acknowledges the difficulty of quantifying the costs and benefits of the broad scope of activities required under the executive order. The OMB is therefore seeking both quantitative and qualitative information in its assessment effort. Specifically, the OMB requests information that will assist in

- identifying any other information or resources that the public believes will assist the OMB in its efforts to assess the benefits and costs of implementing Executive Order 13166;
- determining how best to quantify the numbers of LEP individuals and which languages they speak;
- determining the number of different languages spoken by LEP individuals, and their geographic distribution;
- characterizing the interactions of LEP individuals with both federal and federally funded entities (e.g., How frequently do LEP individuals interact with government at all levels? What types of government services do LEP individuals typically use? Are there types of services that LEP individuals seek more or less frequently than non-LEP individuals?);
- determining the costs and benefits of improving English language proficiency among LEP individuals;
- ascertaining and quantifying the level of services provided by the government or government-funded organizations to address the special needs of LEP individuals prior to Executive Order 13166, and to what extent changes will be necessary to achieve full compliance with the order and related agency guidance;
- quantifying and describing the costs to the federal government or recipients of federal funds of providing oral and written

translation services;

- quantifying and describing the benefits to LEP individuals and society as a result of having oral and written translation services available, in accordance with Executive Order 13166;
- identifying any existing studies of the costs and benefits of improving the quality of communications and interactions between LEP individuals and the federal government or federally funded services.;
- identifying any existing studies of similar language or translation issues internationally (e.g., in Canada, the European Union, and the United Nations);
- identifying “real world” case studies that illustrate the costs and benefits of providing translation services to LEP individuals, as envisioned by Executive Order 13166 and related agency guidance (i.e., examples from multiple perspectives, including LEP individuals and federal agencies/recipients of federal funds, and the international context);
- identifying existing academic research and “real world” case studies from the the health, social services/income maintenance, education, transportation, law enforcement, and trade sectors

(OMB also requests recommendations of additional sectors or perspectives it should consult); and

- identifying any other information or resources that the public believes will assist the OMB in its benefit and cost assessment efforts.

It is not clear how the OMB will determine the accuracy or relative weight of the information provided. Opponents of the executive order are expected to flood the OMB with allegations regarding the excessive cost of compliance. Agencies, service providers, and advocates who understand the benefits of providing access to services, cost effective methods of doing so, and the consequences or costs of denying these services also have an opportunity to be heard. The National Immigration Law Center will work with other national organizations to coordinate and submit model comments.

Responses to the request for information must be received by Dec. 31, 2001. The OMB will issue its report to Congress by Mar. 12, 2002. Responses should be sent to Brenda Aguilar, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

66 Fed. Reg. 59,824 (Nov. 30, 2001).

The National Immigration Law Center . . .

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

NILC's work is made possible by . . .

. . . income from foundation grants, publication sales, and tax-deductible contributions from individuals and groups. To make a contribution, please check one of the boxes provided, fill in the information requested at the bottom of this notice, and mail your check and this return form to NILC's Los Angeles office.

Enclosed is my contribution of . . . \$25 \$50 \$100 \$ _____

To order IMMIGRANTS' RIGHTS UPDATE or other NILC publications . . .

I wish to subscribe to IMMIGRANTS' RIGHTS UPDATE (subscription \$50/year - 8 issues)

I wish to order the DIRECTORY OF NONPROFIT AGENCIES (\$12 plus tax - 8% for California residents)

Quantity _____ **Amount enclosed \$** _____

I wish to order the IMMIGRANTS' RIGHTS MANUAL (\$60 (nonprofits) or \$120 (others) plus tax - 8% for California residents)

Quantity _____ **Amount enclosed \$** _____

Send me a NILC publications order form

Total enclosed \$ _____

YOUR NAME _____ ORGANIZATION _____

STREET ADDRESS _____ CITY/STATE/ZIP _____

PHONE NUMBER _____ FAX NUMBER _____

MAIL THIS FORM (PLEASE ENCLOSE PAYMENT) TO NILC'S LOS ANGELES OFFICE, C/O NILC PUBLICATIONS

NATIONAL IMMIGRATION LAW CENTER

3435 Wilshire Boulevard, Suite 2850

Los Angeles, CA 90010

Address correction requested