



Immigration Issues

ATTORNEY GENERAL PROPOSES MAJOR CHANGES AT BIA – The U.S. Dept. of Justice has issued a proposed rule that would reduce the size of the Board of Immigration Appeals from 23 to 11 members and significantly change the procedure for filing appeals. The rule would eliminate the BIA's jurisdiction to review cases de novo, impose new time limits, and create new consequences for failing to meet time limits.

The attorney general's proposal assumes that the BIA will significantly reduce its current backlog of over 55,000 cases within 180 days. After this 180-day transition period, the reduction in

the BIA's size to 11 members would take effect. The attorney general would decide which members would remain on the Board, while the BIA chair would retain authority to allocate members to screening panels and to three-member panels.

The proposed rule would authorize the BIA chair to set up a case management system in which each appeal would be screened by a single member, who would either decide the case or determine that it is appropriate for a three-member panel to hear. Three-member panels would be assigned only if necessary for the following:

- to settle inconsistencies between rulings by different immigration judges;

IN THIS ISSUE

IMMIGRATION ISSUES

Attorney general proposes major changes at BIA 1

DOJ issues regulations for T visas, available to victims of trafficking 2

In tracking down "absconders," DOJ to target nationals of countries where Al Queda is active 6

Legislation Update: Congress fails to extend §245(i) adjustment, passes affidavit of support measure 6

INS issues final rule raising fees for many applications and petitions 7

INS issues advisory on asylee adjustment processing 7

INS reopens comment period on detention rule for unaccompanied minors 8

BIA reverses *Matter of Vasquez-Muniz* to find state conviction for possession of firearm by a felon is "aggravated felony" 8

Refugee admissions for FY 2002 set at 70,000, but falling behind 9

AG extends TPS designation for Angola 9

LITIGATION

Supreme Court upholds validity of Border Patrol stop 10

3d and 9th Circuits hold mandatory detention provision unconstitutional 11

9th Circuit issues en banc decision finding the deadline for motions to reopen deportation proceedings is subject to equitable tolling 12

9th Circuit overrules earlier decision to find jurisdiction over issues of eligibility for discretionary relief from removal 13

3d Circuit finds embezzlement conviction not an aggravated felony 14

9th Circuit rules that felony conviction for DUI with prior violations is not an aggravated felony 14

ACLU files suit to challenge closed immigration hearings ... 14

Lawsuit challenges INS denial of fee waivers 15

EMPLOYMENT ISSUES

Lawsuit challenges new citizenship requirement for airport screeners 15

Onion grower to pay for preferring H-2A workers over U.S. citizens 15

Congress extends the Basic (Employment Eligibility Verification) Pilot Program 15

IMMIGRANTS & WELFARE UPDATE

Federal agencies republish LEP guidance for comments; advocates submitting supporting comments 16

Substantial restoration of immigrants' food stamps eligibility passes Senate 16

TANF reauthorization bill introduced; would restore TANF and SSI for immigrants and address needs of LEP recipients 17

2002 Federal Poverty Guidelines issued 18

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.

- to clarify ambiguous laws, regulations or procedures;
- to correct the decision of an IJ that is plainly not in conformity with the law;
- to resolve a case or controversy of major national import; or
- to correct a clearly erroneous factual determination by an IJ.

An appellant who asserted that a three-member panel is warranted for a case would have to identify the specific factual or legal basis for that contention in his or her notice of appeal.

The interim rule also sets forth new standards for summary dismissals. Under the rule, in addition to using any of the grounds currently specified in the regulations for summary dismissal, a single Board member could summarily dismiss an appeal if, after review of the record, the member determined that the appeal was filed for an improper purpose or to cause unnecessary delay or that the appeal lacked an arguable basis in fact or law. Filing an appeal that is summarily dismissed would also constitute frivolous behavior that could be cause for discipline.

The proposed rule would require acceptance of an IJ's factual findings unless they were deemed to be clearly erroneous. Except when taking administrative notice, the BIA would not consider new evidence. Accordingly, the rule states that the proper method of developing factual issues would be to remand the case to the IJ or the INS.

The interim rule sets forth the following timelines for appeal procedures and decisions:

The rule retains the 30-day deadline for filing a notice of an appeal from the decision of an IJ. However, the appeal is then to be referred to a screening panel, where it is to be reviewed by a single Board member. The reviewing member is to promptly dismiss any appeal subject to summary dismissal under the regulations. In cases that are not summarily dismissed, the screening panel will arrange for completion of the record of proceedings and transcript.

Once a case is transcribed, the Board is to set a briefing schedule giving both parties 21 days in which to file simultaneous briefs, "unless a shorter period is specified by the Board." Reply briefs may be filed only by leave of the Board. For good cause shown, the Board may extend the time for filing a brief for up to 90 days.

The Board member who initially reviewed the case, or another member assigned under the case management system, is then to decide the appeal. He or she may affirm the IJ's decision without opinion, if the IJ's decision is correct, the errors below are harmless or nonmaterial, and if

- the issues on appeal are squarely controlled by BIA or federal court precedent and are not being applied to novel factual situations, or
- the factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

If the Board member considers that a written opinion is needed, he or she should issue "a brief order affirming, reversing, modifying, or remanding the decision," unless the Board member designates the case for review by a three-member panel under the criteria described above.

Except in exigent circumstances, the BIA must dispose of all appeals assigned to single Board members within 90 days of completion of the record and transcript or within 180 days after

the appeal is assigned to a three-member panel. In exigent circumstances, the BIA chair is accorded discretion to grant an extension of up to 60 days.

In cases where a panel is unable to issue a decision within the time limits, the BIA chair must either decide the case him or herself within 14 days or refer the case to the attorney general for a decision. If a member wishes to dissent or concur but fails to complete the decision within the extension, the decision must be issued without a separate opinion.

The only exception to these time limits is for cases whose outcome depends on a case pending before the U.S. Supreme Court or a U.S. court of appeal. In such an instance, the BIA chair may hold the case in abeyance until the court decision is rendered.

The BIA chair must notify the director of the Executive Office for Immigration Review and the attorney general if any BIA member repeatedly fails to meet assigned deadlines for the disposition of appeals or fails to adhere to the standards of the case management system. In addition, the BIA chair must, on an annual basis, prepare a report assessing each Board member's timely disposition of cases.

The new rule also proposes the transfer of cases involving the INS's imposition of administrative penalties to the Office of the Chief Administrative Hearing Officer.

In statements released prior to the publication of the proposed rule, the Justice Dept. indicated that the BIA must begin to implement procedural changes in April, when the rule is anticipated to take effect. During the transition period, members must apply the rule's new procedures to all cases already pending and to all incoming cases. The Justice Dept. hopes that by the end of the transition period, no case will remain pending for longer than ten months.

Comments on the proposed rule are due by Mar. 21, 2002.

67 Fed. Reg. 7,309-18 (Feb. 19, 2002).

DOJ ISSUES REGULATIONS FOR T VISAS, AVAILABLE TO VICTIMS OF

TRAFFICKING – The U.S. Dept. of Justice has issued interim regulations implementing the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA), which provides a way for people who have been trafficked into the United States for illegal purposes to obtain temporary lawful status, provided they cooperate with any reasonable requests for assistance made by law enforcement officials. The interim rule establishes the procedure to apply for T status and the standards under which eligibility will be determined. Individuals may adjust to lawful permanent resident status after they have been in T nonimmigrant status for three years; the INS will separately issue regulations concerning the process for this adjustment of status.

Eligibility. Non-U.S. citizens who are admissible to the U.S. may be classified by the Immigration and Naturalization Service as T-1 nonimmigrants if they demonstrate that they

- are or have been the victim of a "severe form of trafficking in persons";
- are physically present in the United States, Samoa, the Mariana Islands, or a port of entry;
- would suffer extreme hardship involving unusual and severe harm if they were removed from the United States; and
- have complied with any reasonable request for assistance in

a trafficking investigation or prosecution, or are less than 15 years old.

The regulation requires that in order to be granted T visas, individuals must have had contact with a law enforcement agency (LEA), either by reporting a crime or by responding to inquiries from an LEA. The regulation also restricts the definition of an LEA to include only federal law enforcement or prosecuting agencies authorized to investigate or prosecute trafficking crimes. Thus, state or local law enforcement agencies conducting a criminal investigation would have to contact a federal agency in order to be able to assist a victim to obtain a T visa.

The statute provides that a "severe form of trafficking in persons" includes trafficking for the purpose of obtaining or providing a person to engage in a commercial sex act in which the act is induced by force, fraud, or coercion or which is performed by a trafficked person who is younger than 18 years of age. It also includes recruiting a person through force, fraud, or coercion for the purpose of subjecting the person to involuntary servitude, peonage, debt bondage, or slavery—all of which are defined specifically in the new rule. Under the regulations, victims must have been subjected to some form of force, fraud, or coercion to provide labor or services or to engage in a commercial sex act, except in the case of victims younger than 18 years of age who were induced to perform a commercial sex act.

Application Procedure. Applicants for T visas must file the new Form I-914 (Application for T Nonimmigrant Status) with the INS's Vermont Service Center. The application packet, including attachments and instructions, is 17 pages long. A complete application includes the following:

- The proper fee or a request for a fee waiver. The INS has set the fee at \$200 for the principal applicant, and \$50 for each accompanying family member up to a maximum fee of \$400 for one application.
- Three current photos.
- A fingerprint fee of \$50 per person.
- Evidence that the principal applicant has been a victim of a severe form of trafficking.
- Evidence that the applicant is physically present in the U.S. on account of being a victim of a severe form of trafficking.
- Evidence either (1) that the applicant has complied with a reasonable request for assistance made by a law enforcement agency that investigates and prosecutes traffickers or (2) that the applicant is not yet 15 years of age.
- Evidence that the applicant would suffer extreme hardship if he or she were removed from the U.S.
- Individuals who are inadmissible also need to apply for a waiver by submitting form I-192 (Application for Advance Permission to Enter as a Nonimmigrant). The INS recently raised the fee for this form to \$195.

If possible, the applicant should also submit a "law enforcement agency endorsement" ("LEA endorsement") or evidence that the INS has arranged for the applicant's continued presence in the United States. The endorsement is not mandatory, but it constitutes primary evidence that the applicant is a victim of a severe form of trafficking and has not unreasonably refused to assist an investigation or prosecution. An LEA endorsement is made on Supplement B to Form I-914 and consists of a declaration made by an officer of a federal law enforcement agency that

investigates or prosecutes person-trafficking crimes. However, neither an LEA endorsement nor evidence of INS-arranged continued presence is necessary if the applicant is under 18 years of age. The application must include the applicant's statement describing how he or she was victimized by traffickers.

To be eligible for a T visa, a person who was the victim of trafficking before Oct. 28, 2000 (the date the VTTPA became law) must apply for the visa within one year of Jan. 31, 2002. A person who was a child (unmarried and under 21 years of age) when he or she was victimized must file within one year of his or her twenty-first birthday or within one year of Jan. 31, 2002, whichever comes later. For filing purposes, the victimization will be deemed to have occurred on the last day in which an act constituting an element of the trafficking act occurred. The applications of persons who miss their deadline will not be considered unless they provide evidence that exceptional circumstances prevented them from filing on time—e.g., that they suffered severe psychological or physical trauma that delayed their application.

All applicants must be fingerprinted for criminal background checks. After filing their application, they will be scheduled for a fingerprinting appointment, and they may be required to undergo a personal interview with an INS examiner.

Persons in pending immigration proceedings who intend to apply for a T visa must notify the INS of their intention. If the INS counsel concurs, a trafficking victim may request that proceedings be administratively closed or that a motion to reopen or reconsider be indefinitely continued to allow him or her to file an application. If the individual appears to be eligible for a T visa, the immigration judge or the Board of Immigration Appeals (whoever has jurisdiction) may grant the request to close the matter or continue the motion indefinitely. If the INS later finds the individual to be ineligible for a T visa, the INS may recommence proceedings by filing a motion to recalendar. If the individual is in INS custody, the INS may continue to detain him or her until it renders a decision on the T visa application.

Individuals with final orders of removal are not precluded from filing T visa applications, but filing a T visa application has no effect on the execution of a final order. An applicant may request a stay of removal under 8 C.F.R. section 241.6(a), and if the INS determines that the person's application is bona fide, it will automatically stay the execution of the order. Such stay will remain in effect until a final decision is made on the T visa application. However, the INS will not count the period of time that the stay is in effect in determining whether the individual's continued detention under a final order is reasonable under the standards of 8 C.F.R. section 241.4.

If the T visa application is denied, the stay is lifted as of the date of the denial, regardless of any appeal. If, on the other hand, the INS grants the application, the final order is cancelled as of the date of the approval.

Physical Presence. An application for a T visa must show that the applicant is physically present in the United States, American Samoa, the Mariana Islands, or a port of entry on account of having been the victim of a severe form of trafficking in persons. Persons may be considered to be physically present on account of trafficking if they were the victims of trafficking in the past and their continued presence is directly related to trafficking. Trafficking victims who have left the U.S. voluntarily after having

been trafficked and then have returned are not considered to be physically present on account of trafficking unless they returned as victims of a new incidence of trafficking.

The regulations require that trafficking victims who escaped the trafficking situation before a law enforcement agency got involved show that they did not have a clear chance to leave the U.S. in the interim. For example, they must show that psychological trauma, or injury, or lack of resources, or lack of access to travel documents prevented them from leaving the U.S. after they escaped from the trafficking situation.

Evidence of Compliance with LEA Requests for Assistance. An LEA endorsement describing how the T visa applicant assisted the LEA in investigating or prosecuting a trafficking crime is considered primary evidence that the victim has reasonably complied with a request for assistance. Although an LEA endorsement is not a requirement, the INS strongly recommends that applicants obtain one. Applicants who do not submit an endorsement must submit an explanation describing their attempts to obtain one and why their request was refused. If the INS determines that an applicant has not complied with a reasonable request for assistance from an LEA, the application will be denied or an approved application will be revoked.

Credible secondary evidence and affidavits may be submitted with the T visa application to explain why the applicant could not submit an LEA endorsement. Secondary evidence must include an original statement by the applicant showing why an LEA endorsement is unavailable. Statements or evidence submitted by the applicant must show (1) that an LEA that is charged with detecting, investigating, or prosecuting trafficking crimes knows about the trafficking situation the applicant was involved with and (2) that the applicant complied with any reasonable request for assistance made by the LEA. If the applicant did not report the trafficking crime at the time it occurred, he or she must explain why. Applicants who have never had contact with an LEA are not eligible for a T visa.

T visa applicants who are under 15 years of age need not have assisted with an investigation or prosecution in order to be eligible for lawful status. However, such applicants must provide evidence of their age. Primary evidence of age includes a birth certificate, passport, or certified medical opinion. Secondary evidence includes documents described in 8 C.F.R. section 103.2(6)(2)(i), such as church or school records.

Evidence of Hardship if Removed. To qualify for a T-1 visa, applicants must show that they would face "extreme hardship involving unusual and severe harm" if they were removed from the United States. This standard is higher than that required of applicants for suspension of deportation. According to the new rule, "A finding of extreme hardship involving unusual and severe harm may not be based upon current or future economic detriment, or the lack of, or disruption to, social or economic opportunities." In determining whether the applicant would suffer extreme hardship, the INS must take into account factors it has traditionally taken into account in making such determinations, plus any factors associated with the applicant's having been a victim of a severe form of trafficking in persons. The extreme hardship-related factors the INS should take into account include but are not limited to the following:

- The applicant's age and personal circumstances.

- Any serious physical or mental illness from which the applicant suffers and whether treatment for such illness is "reasonably available" in the applicant's country of origin.

- The nature and extent of any physical or psychological consequences of the applicant's having been the victim of a severe form of trafficking in persons.

- The impact on the applicant of losing access to the U.S. courts and criminal justice system, including access to criminal and civil redress for trafficking crimes of which the applicant was a victim.

- "The reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the applicant would be returned would penalize the applicant severely for having been the victim of a severe form of trafficking in persons."

- The likelihood that the applicant would again become the victim of trafficking, including whether the government of the applicant's country of origin could or would protect the applicant from being revictimized.

- The likelihood that the trafficker or the trafficker's agents would harm the applicant once the latter was back in his or her country of origin.

- The likelihood that the applicant's individual safety would be seriously threatened by the existence of civil unrest or armed conflict in the applicant's country of origin.

Waivers of Inadmissibility. The regulations provide that applicants for a T visa who are inadmissible are not eligible for T status unless they can obtain a waiver. INA section 212(d)(3) gives the INS general authority to waive most of the grounds of inadmissibility for nonimmigrants. In addition, INA section 212(d)(13) gives the attorney general additional authority to waive most grounds of inadmissibility for victims of trafficking where he or she finds it to be in the national interest to grant a waiver. It is to be expected that many victims of trafficking will need waivers because of the very circumstances that make them victims. With respect to the public charge ground, the supplementary information to the interim rule notes that, "[f]or the purposes of receipt of public benefits, Congress has recognized that victims of trafficking are in much the same position as refugees, and therefore has provided specific authority for the Service to exempt them from the ground of inadmissibility for aliens who are likely to become a public charge." However, rather than establishing a simpler procedure for applicants to obtain waivers of public charge and other grounds that are likely to commonly arise, the rule requires applicants who need a waiver to submit Form I-192, Application for Advance Permission to Enter as Nonimmigrant, with its \$195 fee or a request for a fee waiver, at the time they file their I-914 application.

Bona Fide Application. The INS will review each newly filed T visa application to determine if it is bona fide. An application is not bona fide if the applicant is inadmissible, except where the grounds of inadmissibility fall under INA section 212(d)(13) (which gives the INS general authority to waive many grounds of inadmissibility for victims of trafficking) or if the INS has already granted a waiver on any other grounds.

Once the INS has determined that an application is bona fide, it must provide the applicant written confirmation of this. Such a determination automatically stays the execution of a final order of

removal, and the stay remains in effect until the INS renders a final decision on the T visa application. The rule provides that neither an immigration judge nor the BIA has jurisdiction to adjudicate an application for a stay on the basis of a T visa application.

The supplementary information to the rule notes that once the INS has determined that an application is bona fide, adult applicants may apply to the Dept. of Health and Human Services to be certified to receive benefits and services. Applicants under 18 years of age do not need a bona fide determination or an HHS certification to receive benefits.

Decision on Application. The INS will issue a written decision granting or denying each application. If the INS grants the application, the applicant is subject to an annual cap of 5,000 T-1 visas. If no visa numbers are available at the time the application is approved, the applicant will be placed on a waiting list. While on the waiting list, the applicant will maintain the temporary immigration status that has been preventing him or her from being removed from the U.S.—e.g., deferred action status, parole, or other temporary INS-granted relief. When new T-1 visa numbers become available, the INS will issue them to applicants on the waiting list in the order in which their applications were filed. Before actually granting the visas to applicants on the waiting list, the INS may require them to undergo a new fingerprint and criminal background check.

Once applications are granted, the INS must provide the approved applicant a list of nongovernmental organizations that can assist him or her. The INS will also provide the T-1 nonimmigrant an employment authorization document (EAD).

Admission of the Principal Applicant's Family. A person who has applied for or been granted T-1 visa status may apply to have his or her immediate family members admitted to the U.S. In order to be granted derivative status, members of the principal applicant's immediate family must show that they would suffer extreme hardship if they were not allowed to accompany or join the principal applicant.

The principal applicant may apply for the admission of immediate family members by filing Form I-914 by mail with the INS. The principal may apply for derivative family members at the same time he or she applies for T-1 status, or in a separate application filed at a subsequent time. The I-914 must be accompanied by the following (for each family member seeking derivative status):

- The fee for filing the I-914, as well as the appropriate fingerprint fee
- Three (3) current photos
- Evidence of the family member's relationship to the principal applicant
- Evidence that the family member would suffer extreme hardship if he or she were not allowed to accompany or join the principal applicant. Family members who are in the United States may apply for employment authorization at the same time that they apply for T status, by filing Form I-765.

Derivative status is available for a spouse (T-2), child (T-3), or parent (T-4, where the principal applicant is a child) of a T-1 principal applicant. The family relationship must exist at the time that the application was filed and must continue to exist at the time of the family member's admission. If the principal proves he or she became a parent of a child after the application was filed, the child

will be eligible to accompany or join the principal.

Applicants must show that each family member for whom derivative status is being sought, or the principal applicant himself/herself, would suffer extreme hardship if the family member were not granted admission to the U.S. For family members who would follow to join the principal applicant, the hardship they face must be more severe than the hardship generally experienced by other residents of their country of origin. Factors the INS will take into account include but are not limited to the following:

- "The need to provide financial support to the principal applicant."
- The principal applicant's need for family support.
- The risk that a trafficker or an agent of the trafficker will do serious harm to the family member.

Duration of the T Nonimmigrant Status. An approved applicant's T nonimmigrant status expires three years from the date the I-914 is approved, and is not renewable. Applicants must immediately notify the INS of any changes that may affect their eligibility for T nonimmigrant status. Persons in T nonimmigrant status who want to adjust to permanent residence must apply for adjustment within the 90 days immediately preceding the third anniversary of having their I-914 application approved.

Denials and Revocation. When the INS denies a T visa application, it must provide written notification of the denial—including the reasons for it—to the applicant, to any LEA that provided an endorsement, and to the U.S. Dept. of Health and Human Services. All benefits derived from having filed the application are automatically revoked when the denial is issued. If the applicant appeals the denial, it will not become final until the appeal is adjudicated.

The INS will send to a person in T nonimmigrant status a notice of intent to revoke the status of the person if any of the following apply:

- The T nonimmigrant violated any of the requirements of INA section 101(a)(15)(T) or of the regulations.
- The approval of the person's application violated the regulations or "involved error in preparation procedure or adjudication that affects the outcome" of the adjudication.
- In the case of a spouse who derived T-2 status from being married to a T-1 nonimmigrant, the T-2's divorce from the T-1 becomes final.
- In the case of a principal (T-1) nonimmigrant, an LEA with jurisdiction to detect, investigate, or prosecute trafficking crimes notifies the INS that the person has "unreasonably refused to cooperate" with the LEA's law enforcement efforts.
- The LEA withdraws its endorsement of the T-1 nonimmigrant "or disavows the statements made therein and notifies the [INS] with a detailed explanation of its assertions in writing."

An INS district director may revoke approval of T nonimmigrant status at any time, even after the validity of the status has expired. The notice of intent to revoke must be in writing and must contain a detailed statement of the grounds for revocation and notice of the 30-day time period allowed for the person to submit a rebuttal. If, after reconsidering an application, the district director revokes the approval of an application, the district director must provide the applicant with written notification of the decision that explains the specific reasons for the revocation.

If a principal application's approval is revoked, all derivative

approvals are also revoked; and if derivative applications are pending when a principal application's approval is revoked, they will be denied.

The interim rule takes effect on March 4, 2002. Written comments must be submitted on or before April 1, 2002.

67 Fed. Reg. 4,783-820 (Jan. 31, 2002).

IN TRACKING DOWN "ABSCONDERS," DOJ TO TARGET NATIONALS OF COUNTRIES WHERE AL QUEDA IS ACTIVE – The U.S. Dept. of Justice is implementing an "Absconder Apprehension Initiative" in order to locate, apprehend, interview, and deport non-U.S. citizens who are subject to final removal orders and who have failed to surrender for removal, according to a memo from Deputy Attorney General Larry Thompson to agencies within the DOJ responsible for implementing the plan. According to the memo, the Immigration and Naturalization Service has determined that there are approximately 314,000 such individuals, termed "absconders." The initiative will focus its initial efforts on several thousand individuals from countries where Al Qaeda, the organization presumed to be responsible for the Sept. 11, 2001, terrorist attacks on New York and Washington, D.C., has been active. The DOJ calls these individuals "priority absconders." The memo says that some of them "have information that could assist our campaign against terrorism."

The memo sets out the process for apprehending and interviewing the priority absconders. The first step is for the department's Foreign Terrorist Tracking Task Force to draw the names of priority absconders from the INS Deportable Alien Control System database, search public databases to determine a last known address for the absconder, and search other investigation databases to remove from the list individuals who are subjects or targets of other investigations. Then the INS is to review the A-files of priority absconders to confirm "that the absconder was on notice and that the deportation warrant remains valid," after which the INS is to enter the names into the National Crime Information Center database (NCIC). With copies of relevant information from each absconder's A-file, the INS is to create and transmit an "absconder fugitive file" to the INS field office located in the judicial district of the absconder's last known address.

Local INS and FBI field offices are to coordinate in forming apprehension teams for locating, apprehending, and interviewing each absconder. The memo notes that INS agents can arrest absconders based on the warrant of deportation, while other federal officers can arrest them, under section 243 of the Immigration and Nationality Act, for the felony of willfully failing to depart.

The memo cautions that, unlike the Interview Project, which involved consensual interviews (for more on the Interview Project, see "Justice Dept. Announces Plan to Interview 5,000 Men," IMMIGRANTS' RIGHTS UPDATE, Dec. 20, 2001, p. 2), this initiative is directed at persons who violated the law by failing to comply with a deportation order and, in some cases, by committing other criminal acts. Therefore, they "are to be apprehended and treated as criminal suspects, and they are to be afforded all standard procedural rights and constitutional protections." Absconders are to be advised of their *Miranda* rights, and the interview should proceed only if they waive those rights.

The memo notes that investigators conducting interviews "should feel free to use all appropriate means of encouraging

absconders to cooperate, including reference to any reward money that is being offered and reference to the availability of an 'S' visa." However, investigators "should be careful not to promise that [such inducements] will be forthcoming in a particular case." Interviewers will have a list of questions similar to those used by the Interview Project.

The FBI must review each absconder's case and the results of the interview and determine if it appears that the absconder has any knowledge of terrorism that would justify further investigation. The U.S. attorney's anti-terrorism coordinator will decide whether to proceed with a prosecution under INA section 243 or to allow the absconder to be deported by the INS.

The Jan. 25, 2002, memo was made public by the *Washington Post*, and a copy may be obtained at www.washingtonpost.com/wp-dyn/articles/A42330-2002Feb7.html. The paper reported on Feb. 8, 2002, that, according to DOJ officials, arrests were to begin the following week with a group of fewer than 1,000 noncitizens, most of whom are convicted felons, mostly from the Middle East and Pakistan.

LEGISLATION UPDATE: CONGRESS FAILS TO EXTEND § 245 (i) ADJUSTMENT, PASSES AFFIDAVIT OF SUPPORT MEASURE – After months of debate and several near misses, attempts in Congress to pass a further extension of section 245(i) adjustment have failed yet again. However, Congress has passed a measure that would allow beneficiaries of approved visa petitions whose sponsors die to substitute another family member as an "alternative sponsor" for the purpose of satisfying the affidavit of support requirement.

Section 245(i) Adjustment. Section 245(i) adjustment is a provision within the Immigration and Nationality Act that since 1994 has allowed certain individuals who are otherwise eligible for immigrant visas, but who entered the U.S. without inspection or otherwise fell out of lawful status, to adjust to lawful permanent residence without having to travel to a U.S. consulate outside the country.

In May 2001, the House of Representatives passed a four-month extension of 245(i) adjustment, but with a restriction that previously had not been part of the provision—i.e., that the family or employment relationship upon which the visa application is based have existed on or before Apr. 30, 2001. The Senate also passed an extension, but its version did not contain the House version's new restriction. The House and Senate then worked out a compromise extension that passed the Senate in September 2001 and was supposed to be heard by the House on September 11—the day terrorists destroyed the World Trade Center in New York and attacked the Pentagon. The Bush administration then tried to get the extension included with the Commerce-Justice-State appropriations bill, but that bill never made it to a vote. Finally, Congressman James Sensenbrenner (R-WI), the Chair of the House Judiciary Committee, agreed to have the 245(i) extension included in the Enhanced Border Security and Visa Entry Reform Act of 2001 (H.R. 3525), but restrictionist Republicans led by Congressman Tom Tancredo (R-CO) succeeded in getting the extension stripped out of H.R. 3525, which passed the House but failed to pass the Senate.

Affidavit of Support. On a more positive note, however, on Dec. 20, 2001, the Senate did adopt the Family Sponsor Immigration Act of 2001 (H.R. 1892) by unanimous consent. Introduced by

Congressman Ken Calvert (R-CA), the bill would amend the INA to allow family members other than the petitioner to sign an I-864 affidavit of support on behalf of a visa petition beneficiary when the petitioner dies while the beneficiary's immigrant visa application is pending. As the law stands now, if a petitioning relative dies before the principal beneficiary immigrates to the U.S., the visa petition approval is automatically revoked, unless the INS decides for humanitarian reasons not to revoke the petition.

However, this humanitarian exception does not waive the requirement that the "petitioner" have filed an affidavit of support on behalf of the beneficiary, and for this reason many beneficiaries have not been able to immigrate. H.R. 1892 would expand the definition of "sponsor" to include the visa applicant's spouse, parent, mother-in-law, father-in-law, sibling, child (if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, grandparent, or grandchild, in cases where the petitioner died after the petition was approved and the INS has determined for humanitarian reasons not to revoke the petition. The Senate amended the bill to also add "brother" and "sister-in law" to this list of alternate sponsors, and the House passed the amended version on Feb. 27, 2002.

INS ISSUES FINAL RULE RAISING FEES FOR MANY APPLICATIONS AND PETITIONS – The Immigration and Naturalization Service has published a final rule in the Federal Register that increases the fees charged for numerous categories of applications and petitions. The rule adopts without modification the increases that were laid out in a proposed rule published on Aug. 8, 2001 (see "INS Proposes to Raise Fees for Many Applications and Petitions," IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 2001, p. 6). The fee increases specified in the rule took effect on Feb. 19, 2002.

The INS periodically reviews its fee schedule to ensure that the fees it collects cover the full costs of providing all the agency's adjudication and naturalization services. Collected fees go into the Immigration Examinations Fee Account (IEFA), which is the primary source of funding for the agency's Adjudications and Naturalization Program, as well as some other programs that Congress has directed be funded out of the account. Some of the common applications and petitions for which the INS has increased the fee are listed in the table below; the INS last reviewed and raised fees for some of these applications in 1999.

The rule also doubles the fee for fingerprinting by the INS,

INS Application Fees

Form	Description	Fee Before		
		Fee in 1997	Latest Increase	New Fee
I-90	Application for replacement green card	\$75	\$110	\$130
I-130	Petition to immigrate relative	\$80	\$110	\$130
I-212	Application for permission to apply for admission following deportation or removal	\$95	\$170	\$195
I-485	Application for adjustment of status	\$130	\$220	\$255
I-601	Application for waiver of grounds of inadmissibility	\$95	\$170	\$195
I-765	Application for employment authorization	\$70	\$100	\$120
N-400	Application for naturalization	\$95	\$225	\$260

raising it from \$25 to \$50.

In the supplemental information to the proposed rule, the INS raised questions regarding the methodology the agency used to set the \$300 fee for legalization applications under the Legal Immigration Family Equity Act (LIFE Act). At that time, the agency proposed keeping the fee in place pending further review. The supplemental information to the final rule explains that the INS has now decided to reduce this fee to \$255—the same amount now set for other I-485 adjustment applications—and to refund the difference for applicants who paid the higher fee. The INS will publish a separate rule regarding the timing of refunds.

66 Fed. Reg. 65,811–16 (Dec. 21, 2001).

INS ISSUES ADVISORY ON ASYLEE ADJUSTMENT PROCESSING – The Immigration and Naturalization Service has instituted a new procedure for adjudicating asylees' applications for adjustment to permanent residence. The INS says the new procedure is necessary "[i]n order to ensure utilization of all 10,000 asylum adjustment numbers" for Fiscal Year 2002.

The INS's new policy provides that, as of Jan. 11, 2002, field offices may adjudicate asylee adjustment applications that have a priority date of June 9, 1998, or earlier. (The priority date is the date the asylee's adjustment application was "properly filed." 8 C.F.R. § 209(a).) Prior to Jan. 11, 2002, INS policy was to have all asylee adjustment applications adjudicated by examiners at the agency's Nebraska Service Center. This policy had been in effect since 1998. According to the Lawyers' Committee for Human Rights, the INS's 1998 transfer of asylee adjustment jurisdiction from local offices to the Nebraska Service Center proved chaotic, resulting in a large backlog of unadjudicated cases. The policy instituted last month appears to be an attempt to clear up this backlog.

While the new policy gives some asylee adjustment adjudicating authority back to field offices, it nevertheless maintains the Nebraska Service Center's overall authority over such cases. For example, before adjudicating a case, a field office must obtain an authorization number from the service center. Before requesting authorization to adjudicate a case, the field office must determine that the case file is complete and that the applicant is not eligible for adjustment under another immigration classification (besides "asylee"). In addition, once the field office has adjudicated an application, it must send a copy of the document on which it records its decision (INS Form I-181) to the service center within 10 days.

As of Jan. 1, 2002, all asylee adjustment cases other than those with priority dates of June 9, 1998, or earlier are to be sent to the Nebraska Service Center, according to the Jan. 11, 2002, INS advisory announcing the new policy. However, local offices are to keep and complete work on any cases

for which they have already conducted an interview of the applicant and have either requested that the applicant provide further evidence or decided that the application will be denied.

For all cases forwarded to the Nebraska Service Center, it will send notices to the applicants concerning the requirement that they be fingerprinted and it will adjudicate any cases that do not require that the applicant be interviewed. If the service center determines that an interview is necessary, the applicant's case will be sent to the local office that has jurisdiction over the applicant, and the local office will complete work on the case.

The INS has not instructed the public on how to make inquiries regarding pending asylee adjustment cases. According to the Lawyers' Committee for Human Rights, advocates should call the service center's Adjustment of Status Unit at 402-323-7830. In light of the heavy call volume at the service center, the INS suggests that case inquiries be submitted in writing with the following information:

- The applicant's current name and address, and, if it is different, the name as it appears on the application.
- Any A-number assigned to the applicant or the application.
- The applicant's date of birth.
- The date and place where the application was filed.
- Any receipt number that the INS has issued for the application.
- A copy of the most recent notice that the INS has sent regarding the case.
- The date and office where the applicant was fingerprinted and interviewed, if these steps have been completed.

Inquiries may be mailed to the INS Nebraska Service Center, P.O. Box 87483, Lincoln, NE 68501-7485.

INS REOPENS COMMENT PERIOD ON DETENTION RULE FOR UNACCOMPANIED MINORS

—The Immigration and Naturalization Service has reopened the comment period for its proposed rule establishing procedures for processing juveniles in INS custody (8 C.F.R. § 236.3). The proposed rule's comment period previously closed on Sept. 22, 1998; comments are now due by Mar. 15, 2002. In its notice regarding the new comment period, the INS states that it is particularly interested in receiving comments on the following:

- Determining who speaks for the child regarding immigration matters.
- Circumstances in which it might be necessary to house minors in secure facilities.
- How to minimize the number of juveniles who are placed in INS custody.
- Any new issues that have arisen since the previous comment period.

The proposed rule was issued in response to the comprehensive settlement in *Flores v. Reno*, a lawsuit concerning the rights of detained unaccompanied minors. The rule governed the processing, release, detention, and transport of unaccompanied minors, as well as the procedure whereby they are to be notified of their rights.

The rule would allow children to be released to family members other than their parents, or to non-family members whom the parent or guardian designate, as long as the children's safety and support are guaranteed.

The proposed rule provides that when children must be de-

tained, they must be placed in a licensed facility within three days of being detained, provided such a facility exists in the area where they were apprehended and space is available, or, in all other cases, within five days. All facilities must meet the same standards that apply to other juvenile detention facilities used in other contexts. Also, except in emergencies, the INS must notify the minor's attorney before transferring the child.

The regulation provides that children must be kept in the least restrictive setting consistent with the INS's interest in ensuring that children are well cared for and that they appear for hearings and interviews. Such settings must be age-appropriate as well as suited to the children's special needs.

Minors must be segregated from adults and, if placed in juvenile detention facilities, they must be kept away from delinquents. If a minor is a flight risk or commits a crime, he or she may be placed in a secure facility.

Children may not be transported with adults unless it is unfeasible to separate adults and children. If such "mixed" transport is necessary, children and adults must be kept separate from each other within the vehicle in which they are transported.

Minors must be provided with INS Form I-770, Notice of Rights, informing them that they have a right to judicial review, free legal services, and bond redetermination hearings.

Unaccompanied children who are detained near U.S. borders and who reside in either Canada or Mexico must be advised of their right to make a phone call before they are given a voluntary departure form. All other unaccompanied minors must have communicated with either a parent, relative, friend, or attorney before being presented the form.

Parents who reside in the U.S. must be given notice and the right to respond if their child seeks a form of relief (e.g., release or voluntary departure) that may effectively terminate or otherwise affect some interest in the parent-child relationship.

67 Fed. Reg. 1,670 (Jan. 14, 2002) (notice of reopening of comment period on proposed rule);

64 Fed. Reg. 39,759 (Jul. 24, 1998) (proposed rule).

BIA REVERSES *MATTER OF VASQUEZ-MUNIZ* TO FIND STATE CONVICTION FOR POSSESSION OF FIREARM BY A FELON IS "AGGRAVATED FELONY"

—The Board of Immigration Appeals has issued an en banc ruling reversing its prior decision in *Matter of Vasquez-Muniz*, Int. Dec. 3440 (BIA 2000). In its first ruling in the case, the BIA concluded that a conviction for possession of a firearm by a felon under section 12021(a)(1) of the California Penal Code is not encompassed within the aggravated felony definition of section 101(a)(43)(E) of the Immigration and Nationality Act, which describes certain offenses related to firearms and explosive devices. Subsequently, the U.S. Court of Appeals for the Ninth Circuit in *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001), decided that, for purposes of enhancement of a criminal sentence, a conviction under CPC section 12021(a) is encompassed within INA section 101(a)(43)(E). In light of that decision, a majority of the BIA decided to reconsider and reverse its earlier decision. The new decision concludes that state and foreign convictions are encompassed within the definition of INA section 101(a)(43)(E).

The BIA's first ruling in this case turned on its conclusion that a conviction under CPC section 12021(a)(1) did not constitute

“an offense described in . . . 18 U.S.C. [section] 922(g)(1),” as referenced in the aggravated felony definition of INA section 101(a)(43)(E). 18 U.S.C. section 922(g)(1) is a federal statute that criminalizes possession of a firearm by a felon. It applies to felons who knowingly possess a firearm or ammunition “in or affecting commerce.” The BIA noted that the federal statute’s interstate commerce requirement is commonly called the “jurisdictional element” because the Commerce Clause of the Constitution was the basis for Congress’s enactment of the statute. Because the California statute under which the respondent was convicted did not contain this element, the BIA concluded that it is not “described in” 18 U.S.C. section 922(g)(1) and therefore not encompassed within INA section 101(a)(43)(E).

In *Castillo-Rivera*, the Ninth Circuit reached the opposite conclusion. The defendant had pled guilty to illegal reentry after deportation, and the issue before the appellate court was whether his conviction prior to the deportation under CPC section 12021(a) was for an aggravated felony such as to warrant an enhanced sentence under federal sentencing guidelines. The court reasoned that few state or foreign firearms statutes have a jurisdictional element requiring an effect on commerce, but the court found that Congress intended the aggravated felony definition to encompass state and foreign convictions. The court therefore concluded that the jurisdictional element is not a requirement of INA section 101(a)(43)(E).

Following the decision in *Castillo-Rivera*, the Immigration and Naturalization Service filed a motion asking the BIA to reconsider its decision in *Vasquez-Muniz*, contending that the 30-day deadline on motions to reconsider does not apply to the INS. The BIA did not decide this issue, deciding instead to reconsider the case on its own motion, in light of the decision in *Castillo-Rivera* and the BIA’s own further examination of the statute. The BIA then issued a new decision vacating the previous decision and adopting the reasoning of *Castillo-Rivera*. The BIA’s new decision holds that a conviction under CPC section 12021(a)(1) is encompassed in the aggravated felony definition of INA section 101(a)(43)(E), despite the fact that the state statute does not contain the federal jurisdictional element. Board Member Rosenberg dissented, joined by Members Miller, Brennan, Espenosa, and Osuna, maintaining that the reasoning of the original decision is correct. The dissent would have the BIA acquiesce to *Castillo-Rivera* in cases arising in the Ninth Circuit but continue to apply the original decision in other circuits.

Matter of Vasquez-Muniz, 23 I. & N. Dec. 207, Int. Dec. #3461 (BIA Jan. 15, 2002).

REFUGEE ADMISSIONS FOR FY 2002 SET AT 70,000, BUT FALLING BEHIND – President Bush has announced his determinations regarding refugee admissions during fiscal year (FY) 2002. According to the announcement, the U.S. will admit 70,000 refugees, which is 10,000 fewer refugees than were authorized for FY 2001. Federal FY 2002 began Oct. 1, 2001, and will end Sept. 30, 2002. However, in the wake of the September 11 attacks, a moratorium was imposed on refugee admissions; and although this was lifted on Nov. 21, 2001, actual refugee resettlement is proceeding at a very slow pace. Lutheran Immigration and Refugee Service (LIRS) reports that only 751 refugees were resettled in the first quarter of FY 2002, compared with 14,000 refugees resettled in the first quar-

ter of FY 2001. Despite the authorization for 70,000 admissions, the State Dept. has told LIRS and other national resettlement agencies to expect no more than 45,000–50,000 refugees this fiscal year.

The 70,000 prospective refugee admissions have been allocated among the world’s geographic regions as follows: Africa (22,000); East Asia, including Amerasians (4,000); Eastern Europe (9,000); the former Soviet Union (17,000); Latin America and the Caribbean (3,000); the Near East and South Asia (15,000). In addition, 10,000 refugee admission numbers are to be made available for the adjustment to permanent residence of persons who have been granted asylum in the U.S.

According to the presidential announcement, the administration will grant refugee admission to nationals of Cuba, Vietnam, and countries of the former Soviet Union even if they are still in their countries of origin. 66 Fed. Reg. 63,487–88 (Dec. 7, 2001).

AG EXTENDS TPS DESIGNATION FOR ANGOLA – The U.S. attorney general has extended for another 12 months Angola’s designation as a country whose nationals and residents currently in the United States are eligible for temporary protected status (TPS). First designated on Mar. 29, 2000, TPS for Angola was both extended and redesignated in 2001, and its current designation was due to end on Mar. 29, 2002. Under the extension, only persons who both registered during the initial designation (which ended Mar. 29, 2001) and timely reregistered under the extension, and persons who registered under the redesignation are eligible. In either case, only individuals who have been continuously physically present in and have continuously resided in the U.S. since Apr. 5, 2001, may register for the extension.

TPS is granted to persons from countries that are designated by the AG as experiencing ongoing armed conflict, environmental disaster, or certain other conditions that prevent those persons from returning to their countries of origin. TPS allows individuals to remain and work in the U.S. during the period of TPS designation. In consultation with the State Dept., and after reviewing current country conditions, the AG has determined that the civil war in Angola shows no signs of abating. A recent State Dept. memo reported that the “the conditions under which Angola was designated for TPS have not ceased to exist” and that the situation remains unsafe for the return of Angolan nationals.

To register for the 12-month extension, nationals of Angola (and individuals with no nationality who last habitually resided there) previously granted TPS must apply for it during the reregistration period that began Feb. 1, 2002, and ends Apr. 2, 2002. Such persons need only file Form I-821, Application for TPS, without the \$50 filing fee and also submit Form I-765, Application for Employment Authorization. Those who seek work authorization during the extension must also submit the \$120 fee with the I-765 form. Applicants who already have work authorization or do not seek it must still file the I-765 but need not pay the fee. Reregistration applicants must also submit two 1½” x 1½” photographs of themselves. Last, since applicants for an extension of TPS need not be re-fingerprinted, they do not have to pay the \$50 fee. However, child beneficiaries of TPS who have reached 14 years of age but were not previously fingerprinted must pay the \$50 fingerprint fee with the application for extension.

Under the AG's extension, late initial registration is also possible. To qualify, an individual must

- be a national of Angola (or a person with no nationality who last habitually resided in Angola);
- have been continuously physically present in the U.S. since Apr. 5, 2001;
- have continuously resided in the U.S. since Apr. 5, 2001; and
- be both admissible as an immigrant, except as provided under Immigration and Nationality Act section 244(c)(2)(A), and not ineligible under INA section 244(c)(2)(B).

In addition, the applicant must be able to show that during the registration period beginning Apr. 5, 2001, and ending Mar. 29, 2002, he or she

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

Eligible persons must file their application for late initial registration within the 60-day period immediately following the expiration or termination of the conditions listed above.

The AG estimates that there are approximately 1,000 nationals of Angola who have been granted TPS and are eligible for reregistration under the extension. At least 60 days prior to Mar. 29, 2003, he will review conditions in Angola and determine whether conditions for TPS continue to be met.

67 Fed. Reg. 4,997-99 (Feb. 1, 2002).

Litigation

SUPREME COURT UPHOLDS VALIDITY OF BORDER PATROL STOP – In a unanimous decision, the United States Supreme Court has overturned a decision of the Court of Appeals for the Ninth Circuit that had found a Border Patrol vehicle stop to be unreasonable and in violation of the Fourth Amendment. The Court found that the Ninth Circuit, in separately analyzing each of the factors that were asserted to justify the stop, utilized an improper methodology that failed to fully take into account the “totality of the circumstances” under which the stop was made. The Court concluded that the totality of the circumstances supported the finding that the Border Patrol agent had reasonable suspicion to believe that the defendant was engaged in illegal activity.

The decision comes on appeal from a district court's denial of a suppression motion in a criminal case. The stop in question occurred when the defendant, a Mr. Arvizu, was driving a minivan on a little-used road in the Coronado National Forest near Douglas, Arizona, with his sister and their three children. A Border Patrol agent, Officer Stoddard, stopped the van after making a number of observations, listed below, that led him to suspect that the defendant was engaged in illegal activity. After stopping the van, Stoddard asked Arvizu if he could look around the van, and Arvizu agreed. Stoddard then opened the van's sliding door, at which point he noticed a black duffel bag in the back and smelled marijuana. He opened the bag and found marijuana, and Arvizu

was charged with possession with intent to distribute marijuana.

At a suppression hearing in district court, Arvizu contended that Stoddard did not have reasonable suspicion to stop the minivan, and that he (Arvizu) had not voluntarily consented to the search of the van. The court denied both motions. The court relied on a number of factors to find that Stoddard's decision to stop the van was based on reasonable suspicion: (1) the road on which the van was traveling was known to be used by smugglers seeking to avoid the Douglas Border Patrol checkpoint; (2) the van was traveling through the area within an hour of a Border Patrol shift change, at a time that knowledgeable smugglers would be aware that agents were heading back to the office and not patrolling; (3) a minivan was stopped on the same road several weeks previously and was found to contain drugs; (4) Stoddard knew that minivans were a type of vehicle used by smugglers, and he did not recognize the minivan as a local car; (5) when the minivan approached Stoddard's parked vehicle it slowed down; (6) Arvizu appeared to Stoddard to be rigid and stiff, and he did not look at Stoddard as he passed him, whereas in that area most drivers give agents a friendly wave; (7) the children's knees were raised, indicating that their feet were resting on something on the floor of the van; (8) after the van passed Stoddard and he began to follow in his vehicle, the children began waving at him in a mechanical and abnormal manner that suggested to Stoddard that they had been instructed to do so; (9) the van turned onto a dirt road that, although passable for vans, more commonly was used by four-wheel-drive vehicles; and (10) when Stoddard radioed for a registration check, he found that the van was registered to an address in Douglas that Stoddard recognized as a neighborhood commonly used by smugglers. Stoddard appealed the denial of the suppression motions.

On appeal, a panel of the Ninth Circuit found that some of the factors on which the district court relied were not relevant or appropriate and that the other factors were not sufficient to establish reasonable suspicion. The court found the fact that Arvizu slowed the minivan after spotting a law enforcement vehicle to be “an entirely normal response that is in no way indicative of criminal activity.” The court found the fact that Arvizu did not acknowledge Stoddard to be of “questionable value” that would be relevant only if some special circumstances made avoidance improbable. And the court found the odd waving of the children to be irrelevant, noting that “if a driver's failure to wave at an officer provides no support for a determination to stop a vehicle, it would be incongruous to say that the vehicle could be stopped because children who were passengers in the car did wave.”

The court found that many of the other factors on which the district court relied carried little weight and were subject to innocent explanation, and concluded that the totality of the circumstances did not justify the stop. The court also concluded that the illegal stop tainted the subsequent search such that it could not be considered consensual. The government then sought review in the Supreme Court.

In a unanimous decision, the Supreme Court rejected the methodology used by the Ninth Circuit to evaluate whether the stop was based on reasonable suspicion, finding that the lower court's “evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the ‘totality of the circumstances.’” The Court noted that the fact that there

could be an innocent explanation for an observation does not mean that it is entitled to no weight. The Court also criticized the lower court for failing to give "due weight to the factual inferences drawn by the law enforcement officer and District Court Judge." Thus, the Court considered that the Ninth Circuit's refusal to give weight to Stoddard's observation that Arvizu slowed down upon spotting Stoddard's vehicle failed to account for the fact that such conduct may be more suspicious in an empty desert than on a freeway in a major city. The Court found that the lower court's dismissal of the observation that Arvizu failed to acknowledge Stoddard ignored Stoddard's "specialized training and familiarity with the customs of the area's inhabitants," who commonly waved to him. And the Court also found that Stoddard's assessment of the children's odd mechanical waving was entitled to some weight. The Court concluded that, while each factor "is susceptible to innocent explanation, and some factors are more probative than others," when considered together "they sufficed to form a particularized and objective basis for Stoddard's stopping the vehicle."

United States v. Arvizu,
No. 00-1519 (Supreme Court, Jan. 15, 2002).

3D AND 9TH CIRCUITS HOLD MANDATORY DETENTION PROVISION UNCONSTITUTIONAL—In separate actions, the Third and Ninth Circuit Courts of Appeal have ruled that a mandatory detention provision passed as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is unconstitutional as applied. The provision is codified at section 236(c) of the Immigration and Nationality Act.

Among other things, section 236(c) provides that non-U.S. citizens residing in the U.S. who have been convicted of an aggravated felony may not be released on bond. Once a noncitizen completes a criminal sentence, he or she is detained by the Immigration and Naturalization Service for removal purposes and is entitled to a bond hearing before an immigration judge. If the IJ determines that section 236(c) applies to the detained noncitizen's case, the hearing concludes. Under the statute, once the IJ has determined that section 236(c) applies, he or she is precluded from inquiring into any grounds that might exist for releasing the detainee on bond. Relying heavily on the U.S. Supreme Court's decision in *Zadvydas v. Davis*, 150 L.Ed.2d 753, 121 S.Ct. 2491 (2001), both courts found section 236(c) to be unconstitutional.

The case in the Third Circuit involves a Mr. Patel, a 55-year-old lawful permanent resident who, as of the time of his arrest, had lived in the U.S. for over 18 years. In January 2000, he pled guilty to the offense of harboring an undocumented alien. The plea led to a conviction that was later deemed an aggravated felony and subjected him to section 236(c)'s no-bond provision. As a result, Patel was confined in INS detention for eleven months, a period more than twice as long as his five-month imprisonment for the harboring offense.

In his argument before the Third Circuit, Patel contended that section 236(c)'s preclusion of individualized hearings to determine whether individual detainees are a flight risk or a danger to the community implicates a fundamental liberty interest. In response, the government argued that a criminal immigrant does not enjoy such an interest. Rather, the government characterized the interest a criminal immigrant does have as being the right to be free of arbitrary detention, subject only to limited judicial re-

view. The government also asserted, as it has many times, that Congress enjoys plenary power over immigration matters and the judicial branch must defer to it.

The Third Circuit agreed that congressional authority over immigration is indeed vast but relied on *Zadvydas* and other Supreme Court precedent to affirm that Congress's power is subject to constitutional limits. It then began its analysis by inquiring into the nature of the right asserted by Patel. Relying on Supreme Court precedent, it determined that Patel was asserting a liberty interest. A restriction of such an interest requires heightened scrutiny and must be narrowly tailored to serve a compelling state interest.

The court then took guidance from *U.S. v. Salerno*, 481 U.S. 739 (1987). *Salerno* applies a two-part due process inquiry into restrictions on liberty. The test asks, first, whether the restriction on liberty constitutes impermissible punishment or permissible regulation and, second, whether the statute is excessive in relation to Congress's regulatory goals. Finding that the statute constitutes permissible regulation, the court easily dispensed with the first question. The second inquiry was the focus of the court's discussion. The court held that due process requires adequate and proportionate justification for detention. Such an assessment cannot be established without individual inquiry into the reasons for detention. Furthermore, the court found that no justification exists to detain immigrants without individualized hearings. Accordingly, it found the no-bond provision in section 236(c) to be unconstitutional.

In a separate case—*Kim v. Ziglar*—the Ninth Circuit also reviewed the no-bond provision of section 236(c). In this case, the government attempted to justify the no-bond provision by appealing to generalized concerns about the flight risk that criminal aliens represent, as well as concerns about their threat to community safety. The court found these concerns unavailing.

With respect to the flight risk issue, the government argued that if immigrants who commit crimes are not detained, a significant number will abscond. Moreover, the government asserted that for such immigrants, their eventual removal from the U.S. is virtually certain. However, the court examined the government's statistics and disagreed with its conclusions. It also noted that despite their criminal convictions, some immigrants remain eligible for a number of remedies, including withholding of removal, protection under the Convention Against Torture, and, following the Supreme Court's decision in *INS v. St. Cyr*, 121 S.Ct. 2271 (2001), relief under INA section 212(c). In addition, some immigrants might successfully argue that the crimes they were convicted of do not constitute aggravated felonies.

As to concerns about community safety, the government argued that by virtue of having committed certain crimes, criminal immigrants are a menace. The court questioned this logic by pointing to the fact that the category of aggravated felonies includes a wide range of crimes, some of which are dangerous and others that are not. The category also includes crimes that may have been committed in the distant past.

Finally, the Ninth Circuit analyzed whether section 236(c) would pass constitutional muster under Justice Kennedy's analysis in *Zadvydas*. Justice Kennedy dissented in *Zadvydas* and, in his dissent, analyzed the regulatory procedures available to immigrants detained under a final removal order. He found that the

process under which the INS would review whether continued detention was appropriate was constitutionally adequate. Because the mandatory detention provision of INA section 236(c) contains no such review process, the court concluded that the no-bond provision would be unconstitutional under Justice Kennedy's analysis.

Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001);

Kim v. Ziglar, 276 F.3d 523 (9th Cir. 2002).

9TH CIRCUIT ISSUES EN BANC DECISION FINDING THE DEADLINE FOR MOTIONS TO REOPEN DEPORTATION PROCEEDINGS IS SUBJECT TO EQUITABLE TOLLING – The U.S. Court of Appeals for the Ninth Circuit has issued an en banc decision affirming prior rulings of the court that find that the 90-day deadline for filing a motion to reopen deportation proceedings is subject to equitable tolling. The court found that the Board of Immigration Appeals erred in not equitably tolling the 90-day deadline during the period of time that the respondent failed to move to reopen because of erroneous advice he received from an Immigration and Naturalization Service officer.

The respondent in this case, a Mr. Socop, is a Guatemalan national who entered the United States as a nonimmigrant visitor in 1992. He overstayed his visa, and in September 1995 he applied to the Immigration and Naturalization Service for asylum and withholding of deportation. In October 1995 the INS denied his application and initiated deportation proceedings against him. At his hearing before the immigration judge, Socop conceded deportability and applied for asylum, withholding, and voluntary departure. In April 1996, the IJ denied all relief and entered an order of deportation, which Socop appealed to the BIA.

In March 1997, while the BIA appeal was pending, Socop married a U.S. citizen. In April 1997 he went to an INS office to ask how to apply to immigrate based on his marriage. An INS officer told Socop to withdraw his BIA appeal and to file an application for adjustment of status with the INS. The INS officer's advice was incorrect; Socop should have first filed the visa petition, and once it was approved, filed a motion to the BIA to remand the case to allow him to apply for adjustment.

As he was instructed, Socop promptly wrote to the BIA, explaining that he was withdrawing his appeal because he was going to file for adjustment of status. He then filed with the INS an immediate relative visa petition, an application for adjustment of status, and an application for employment authorization. On May 5, 1997, the BIA, in response to Socop's letter, issued an order dismissing the appeal and returning the case to the immigration court without further action. This order constituted a final order of deportation, and in July 1997 the INS sent Socop a "bag and baggage" letter to report to the INS in August for deportation. At nearly the same time, Socop was notified by the INS that he could pick up his employment authorization document, which the INS issued based on the adjustment application.

Socop picked up his EAD but at this point had become worried about the status of his case and confused by the different notices he received. On August 6 he went again to the INS office and spoke with the same INS officer who had previously advised him. She again told him to withdraw his appeal in order to adjust his status. However, Socop was now wary of this advice, and consulted an attorney. With the attorney's assistance, on Aug.

11, 1997, Socop filed a motion to reopen with the BIA. He requested that the BIA reopen his case and reinstate his appeal because he had relied on the erroneous advice of the INS officer, and he also asked the BIA to use its authority to reopen the case sua sponte (on its own motion).

The BIA denied the motion as untimely because more than 90 days had passed from the entry of the May 5, 1997, order; Socop's motion was late by seven days. The BIA also refused to use its power to reopen the case sua sponte, finding that Socop did not establish "exceptional circumstances."

Socop filed a timely petition for review of the BIA's denial of the motion to reopen. Socop contended that the government should be equitably estopped from contending that his motion was late, and also that the BIA should have reopened proceedings on its own motion. In 2000, a three-judge panel of the Ninth Circuit ruled in his favor. *Socop-Gonzalez v. INS*, 208 F.3d 838 (9th Cir. 2000). The court ruled that the doctrine of equitable estoppel did not apply in this case because there was no affirmative misconduct on the part of the INS. However, the court found that the BIA abused its discretion in failing to state its reasons and show proper consideration of the equities that Socop presented when he sought sua sponte reopening. The INS then filed a petition for rehearing, and the court granted en banc review. An en banc panel of eleven judges issued the current decision.

The en banc panel found that, while the doctrine of equitable estoppel does not apply in this case, the separate doctrine of equitable tolling does apply. Unlike equitable estoppel, equitable tolling does not require a showing of intentional misconduct on the part of the government. Rather, equitable tolling applies where an individual is unaware of a cause of action or deadline, despite reasonable diligence.

The court rejected the government's argument that it has no jurisdiction to consider Socop's equitable tolling argument because he did not raise it to the BIA and thus failed to exhaust his administrative remedies. The court found that, although Socop's lawyer did not use the words "equitable tolling" in the briefs to the BIA, he "sufficiently raised the issue before the BIA" such that the court can review the issue on appeal. The briefs and supporting declaration submitted to the BIA set forth in detail the factual basis for the equitable tolling claim, including Socop's reasonable reliance on the advice of the INS officer and his lack of knowledge of the need to file a motion to reopen until he received the bag and baggage letter.

The court also rejected the INS's argument that the 90-day deadline for motions to reopen is a jurisdictional requirement and therefore not subject to equitable tolling. Whereas statutes of limitation generally are subject to equitable tolling, Congress may enact filing deadlines that are jurisdictional and may not be equitably tolled. Whether a filing deadline is mandatory and jurisdictional depends upon Congress's intent in establishing the deadline. Examining the statutes underlying the regulation governing reopening of deportation proceedings, 8 C.F.R. section 3.2(c)(2), and their legislative history, the court determined that Congress did not intend the filing deadline to be jurisdictional. As the court noted, the Second Circuit reached the same conclusion in *Javorski v. INS*, 232 F.3d 124 (2d Cir. 2000), and other panels of the Ninth Circuit have also found equitable tolling applicable to mo-

tion to reopen deadlines. *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (180-day deadline for motion to reopen in absentia order tolled due to ineffective assistance of counsel); *Varela v. INS*, 204 F.3d 1237 (9th Cir. 2000) (equitable tolling due to fraud of a notary).

The court further concluded that the circumstances of this case warrant equitable tolling. Socop established both that his ignorance of the filing deadline was caused by circumstances beyond his control and that those circumstances constitute more than "excusable neglect." In this case, Socop's deportation order was the result of his reasonable effort to diligently pursue his rights. Until he received the bag and baggage letter, he had no reason to believe that he was under a deportation order or that he needed to file a motion to reopen, and he reasonably believed that he had followed the correct procedure to adjust status. Accordingly, the court held that the 90-day deadline was tolled during the period from May 5 until July 7, 1997, when Socop received the bag and baggage letter.

Finally, the court rejected the approach to the application of tolling that was taken by a panel of the court in *Santa Maria v. Pac. Bell*, 202 F.3d 1170 (9th Cir. 2000). In *Santa Maria*, the court refused to toll the 300-day limitations period for filing a charge with the U.S. Equal Employment Opportunity Commission because although for much of that period the plaintiff did not know of vital information bearing on the existence of a claim, he nonetheless learned this information before the filing period expired. The *Santa Maria* approach would require the court in this case to determine whether Socop could reasonably have been expected to file the motion to reopen in the period between July 7 and early August, 1997.

The court found that the *Santa Maria* approach is "needlessly difficult to administer, runs counter to Supreme Court precedent, and undermines the policy objectives of the statute of limitations." The court instead adopted a simpler approach, that courts traditionally have employed, which is simply not to count the tolled period when computing the filing deadline. The court reasoned that this approach effectuates the policy objectives of a statute of limitations by allowing the individual the amount of time to file that Congress originally considered to be reasonable.

Socop-Gonzalez v. INS, 272 F.3d 1176 (9th Cir. 2001).

9TH CIRCUIT OVERRULES EARLIER DECISION TO FIND JURISDICTION OVER ISSUES OF ELIGIBILITY FOR DISCRETIONARY RELIEF FROM REMOVAL

The U.S. Court of Appeals for the Ninth Circuit has withdrawn an earlier opinion and issued a new decision in a case that concerns the scope of the court's jurisdiction to review decisions concerning discretionary relief from removal. In the opinion that has now been withdrawn, *Montero-Martinez v. Ashcroft*, 249 F.3d 1156 (9th Cir. 2001), the court held that section 242(a)(2)(B)(i) of the Immigration and Nationality Act deprived the court of jurisdiction over any decisions concerning cancellation of removal, adjustment of status, or the other forms of relief listed in the statute, even for statutory eligibility issues. In the new opinion, the court holds that this jurisdictional bar applies only to decisions made in the exercise of discretion. The court retains jurisdiction over issues such as the one presented in this case, which was whether the respondents were statutorily eligible for cancellation of removal. On the merits, the court rejected

the petitioners' argument that an adult daughter should be considered a "child" for purposes of qualifying for cancellation of removal and denied the petition for review.

The respondents in this case are a father and son who entered the United States from Mexico without inspection in 1986. They were placed in removal proceedings in 1997 and appeared before an immigration judge in 1998. Before the IJ, the respondents initially sought to apply for cancellation of removal but subsequently withdrew their applications, conceding through counsel that the father's adult permanent resident daughter was too old to be a qualifying relative for purposes of eligibility for cancellation. The IJ then granted them sixty days voluntary departure. Representing themselves, the respondents then appealed to the Board of Immigration Appeals, contending that they should be granted cancellation of removal. The BIA ruled that they were statutorily ineligible for cancellation and that the IJ had properly accepted the withdrawal of their applications. They then filed a petition for review with the Ninth Circuit.

In the initial decision on appeal, a three-judge panel of the Ninth Circuit ruled that INA section 242(a)(2)(B)(i) barred the court from exercising jurisdiction over the appeal. Section 242(a)(2)(B) provides that "no court shall have jurisdiction to review – (i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or (ii) any other decision" for which the attorney general has discretionary authority, except for asylum. The INS argued, and a majority of the panel agreed, that subparagraph (i) deprives the appellate court of jurisdiction to review any determinations concerning the forms of relief listed in the subparagraph, including cancellation of removal under INA section 240A(b). Judge Pregerson wrote a strong dissent, maintaining that the use of the term "judgment" in subparagraph (i), and the overall language and structure of the statute, limit the statute's jurisdictional bar to determinations that are made in the exercise of discretion. Since the determination whether the respondents are eligible for cancellation of removal is not an exercise of discretion, Judge Pregerson argued that the jurisdictional bar should not apply in this case.

The respondents, together with amici curiae NILC and the National Immigration Project of the National Lawyers' Guild, then filed a petition for rehearing. In response, the government filed a brief stating that the solicitor general had reviewed the case and determined that its initial position was in error, in light of the Supreme Court's decision in *INS v. St. Cyr*, 121 S.Ct. 2271 (2001). *St. Cyr* confirmed two important principles: that there is a strong presumption in favor of judicial review and that any ambiguities in deportation statutes must be construed in favor of the alien. It also established that the bars to judicial review enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) did not deprive federal courts of jurisdiction to review deportation cases by means of habeas corpus. Thus, were the INS correct that the court of appeals had no jurisdiction to review statutory eligibility determinations such as the one in this case, immigrants nonetheless could obtain review of such issues by means of habeas petitions in federal district court. In light of *St. Cyr*, the government asked the court to withdraw its prior opinion and to find that it has jurisdiction over issues of statutory eligibility.

On Dec. 28, 2001, the court withdrew the original opinion, and

on Jan. 16, 2002, the panel issued a new decision, authored by Judge Pregerson. The court held that INA section 242(a)(2)(B) bars only review of decisions made in the exercise of discretion and does not apply to determinations of statutory eligibility.

Turning to the merits of the respondents' claim that an adult daughter should be considered a "child" for purposes of cancellation, the court noted that the respondents may have waived this claim when they withdrew their cancellation applications and conceded that they were not eligible for cancellation. The court concluded that the definition of "child" in the cancellation statute is governed by INA section 101(b), which states, in pertinent part, that the term "child" "means an unmarried person under twenty-one years of age." The court therefore denied the petition. *Montero-Martinez v. Ashcroft*, No. 99-70596 (9th Cir. Jan. 16, 2002).

3D CIRCUIT FINDS EMBEZZLEMENT CONVICTION NOT AN AGGRAVATED FELONY—The United States Court of Appeals for the Third Circuit has ruled that an Israeli woman's conviction under 18 U.S.C. section 656 for embezzling bank funds over \$400,000 from her employer is not an aggravated felony. The court found that a conviction under section 656 need not involve fraud or deceit and that in order to determine whether a conviction under this section is encompassed within the aggravated felony definition of section 101(a)(43)(M) of the Immigration and Nationality Act (for offenses involving fraud or deceit in which the loss to the victim(s) exceeds \$10,000) it is necessary to examine the specific circumstances of the conviction.

The respondent in this case, a Ms. Valansi, first came to the U.S. from Israel at the age of one and a half months, and has been a lawful permanent resident since 1990. In October 1998, she pled guilty to a charge of embezzlement under 18 U.S.C. section 656. She was sentenced to six months' imprisonment followed by five years' supervised release. After she served her prison term, the Immigration and Naturalization Service initiated removal proceedings against her. At her hearing, the immigration judge found that she was removable for having been convicted of an aggravated felony. The Board of Immigration Appeals affirmed that decision, and Valansi then filed a petition for review with the court of appeals.

Ruling on the appeal, the Third Circuit first noted that if Valansi's offense constitutes an aggravated felony, then the court does not have jurisdiction over the case. However, the court found that it does have jurisdiction to determine the issue of whether the offense is an aggravated felony.

Section 101(a)(43)(M)(i) of the INA defines as an aggravated felony an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000." The court concluded that this provision encompasses not only the specific crime of fraud but also other offenses that include fraud or deceit as a necessary component.

The offense for which Valansi was convicted, 18 U.S.C. section 656, has five necessary elements: (1) the defendant must be an employee, (2) of a federally connected bank, (3) who took cash or other assets, (4) in the custody or care of the bank, (5) with the intent to injure or defraud the bank. The court found that the fifth element can be satisfied by showing either an intent to injure or an intent to defraud. Embezzlement committed with intent to de-

fraud the bank is encompassed within the aggravated felony definition of INA section 101(a)(43)(M)(i); embezzlement committed only with intent to injure the bank is not.

The indictment against Valansi charged that she acted "with intent to injure and defraud the bank." However, at the time that Valansi pled guilty the judge questioned her extensively to ensure that her plea was voluntary and intelligent. Reviewing this plea colloquy, the Third Circuit concluded that it demonstrates that Valansi had the intent to injure her employer by depriving it of its property, but it does not demonstrate that she specifically intended to defraud the bank. The court therefore concluded that her conviction cannot be considered an aggravated felony.

Valansi v. Ashcroft, 278 F.3d 203 (3rd Cir. 2002).

9TH CIRCUIT RULES THAT FELONY CONVICTION FOR DUI WITH PRIOR VIOLATIONS IS NOT AN AGGRAVATED FELONY—Two three-judge panels of the U.S. Court of Appeals for the Ninth Circuit have recently issued decisions that find that a California felony conviction for driving under the influence of alcohol (DUI) with multiple prior convictions is not a "crime of violence" under 18 U.S.C. section 16, and therefore is not an "aggravated felony" under section 101(a)(43)(F) of the Immigration and Nationality Act.

Both decisions follow the court's prior decision in *U.S. v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001). In *Trinidad-Aquino*, the court ruled that a conviction under California Vehicle Code section 23153 for driving under the influence with injury to another is not a "crime of violence" because the statute can be violated through mere negligence (*see* "Three Circuit Courts Rule Felony DUI Conviction Not "Aggravated Felony," IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 2001, p. 12). The same is true for the statute at issue in the two recent decisions, California Vehicle Code section 23550, which provides that a person convicted of three or more separate DUI violations within seven years is punishable by imprisonment for not more than one year. Because this statute has no intent requirement and can be violated through negligence, both panels concluded that it is not a "crime of violence."

The first decision, *U.S. v. Portillo-Mendoza*, 273 F.3d 1224 (9th Cir. 2001), is a ruling on an appeal from the criminal sentencing of the defendant. Apparently neither party raised the issue, but the court on its own motion found that it was improper for the district court to have determined that the defendant's conviction for "DUI with priors" was an aggravated felony warranting enhancement of his sentence under federal sentencing guidelines.

The second decision, *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002), was made on a petition for review of a removal order. Finding that the conviction for DUI with priors is not an aggravated felony, the court granted the petition.

ACLU FILES SUIT TO CHALLENGE CLOSED IMMIGRATION HEARINGS—The American Civil Liberties Union has filed a lawsuit in federal district court for the Eastern District of Michigan to challenge the closing of immigration court hearings to the public and the press. Closed hearings were authorized in a memorandum that Chief Immigration Judge Michael Creppy issued to all immigration judges (*see* "Chief Immigration Judge Issues Guidelines for Secret Removal Hearings," IMMIGRANTS' RIGHTS UPDATE, Dec. 20, 2001, p. 3). The lawsuit was brought on behalf of the Detroit News,

Inc., the Metro Times, Inc., and Congressman John Conyers, Jr., after they were denied access to hearings in the case of Rabi Haddad, a Muslim pastor and community leader in Ann Arbor, Michigan. The complaint charges that the closing of court proceedings pursuant to the memo violates regulations of the Executive Office for Immigration Review, as well as the constitutional protections of the First Amendment and the Due Process Clause. A copy of the complaint in *Detroit News, Inc. v. Ashcroft* is available at www.aclu.org/court/haddad.pdf.

LAWSUIT CHALLENGES INS DENIAL OF FEE WAIVERS – Two low-income lawful permanent residents have filed a lawsuit in federal district court in Los Angeles to challenge denials of their requests for waivers of the naturalization application fee. The suit alleges that the California Service Center (CSC) of the Immigration and Naturalization Service routinely denies fee waiver requests for low-income residents and that the CSC's fee waiver approval rate is dramatically lower than in the rest of the country. The suit further alleges that the CSC's policies violate the United States Constitution and the INS's own regulations and policies.

The plaintiffs are represented by Neighborhood Legal Services of Los Angeles County and the Western Center on Law and Poverty. In a press statement, the organizations representing the plaintiffs point out that INS fees for filing an application to become a U.S. citizen have risen dramatically over the past four years, making fee waivers increasingly important. In January 1999, the fee for filing a naturalization application rose from \$95 to \$225, plus an additional \$25 fee for fingerprinting. Moreover, on Feb. 19, 2002, the day the suit was filed, a further fee increase went into affect, raising the naturalization application fee to \$260 and doubling the fingerprinting fee to \$50 (*see* "INS Issues Final Rule Raising Fees for Many Applications and Petitions," p. 7).

Advocates with clients who have tried to apply for citizenship but were denied a fee waiver by the CSC can contact Bob Graziano of Neighborhood Legal Services via telephone at 818-834-7584 or e-mail at RGraziano@nls-la.org.

Mancilla De Rodriguez, et al., v. Ashcroft, et al.
(C.D. Cal. filed Feb. 19, 2002).

Employment Issues

LAWSUIT CHALLENGES NEW CITIZENSHIP REQUIREMENT FOR AIRPORT SCREENERS – Nine airport baggage screeners have filed suit in federal district court in Los Angeles to challenge the provision of the Aviation and Transportation Security Act that requires all airport screeners to be U.S. citizens by Nov. 19, 2002 (for more on this act, *see* "Newly Enacted Citizenship Requirement to Displace Thousands of Airport Security Screeners," IMMIGRANTS' RIGHTS UPDATE, Dec. 20, 2001, p. 13). The plaintiffs are eight lawful permanent residents and one U.S. national with many years of experience as airport screeners who are working at major airports in California. They include a veteran of the U.S. Army and a U.S. national from American Samoa.

The plaintiffs contend that the citizenship requirement not only fails to improve security but also will decrease security by removing thousands of experienced workers from the airports.

They allege that more than 80 percent of the screeners at San Francisco International Airport and more than 40 percent of those at Los Angeles International Airport are not U.S. citizens. They point out that LPRs may serve in the U.S. Armed Forces and in the National Guard, which is now assigned to provide security at airports. The plaintiffs therefore contend that the citizenship requirement violates equal protection and due process. Plaintiffs are represented by the American Civil Liberties Union Foundation of Southern California, the Service Employees International Union (SEIU), and several other civil rights and nonprofit legal organizations.

Gebin, et al., v. Mineta, et al., (C.D. Cal., filed Jan. 17, 2002).

ONION GROWER TO PAY FOR PREFERRING H-2A WORKERS OVER U.S. CITIZENS – The Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) has reached a settlement with the country's largest grower and shipper of Vidalia onions, which was charged with refusing to hire U.S. citizen workers, primarily African Americans and Latinos, and preferring to hire temporary agricultural workers from Mexico on H-2A nonimmigrant visas. The OSC announced the settlement of the employment discrimination case on Dec. 20, 2001.

As part of the settlement, Bland Farms of Reidsville, GA, has agreed to pay approximately \$62,000 in back pay to the U.S. workers and \$15,000 in civil penalties to the government. The U.S. citizen workers alleged that when they applied for work with Bland Farms they were either not hired or were offered the less desirable jobs, despite the fact that Bland Farms claimed it could not find U.S. workers willing to work in its fields or packing shed. Under existing laws, employers are required to give preference in hiring to qualified U.S. workers over nonimmigrant temporary visa workers.

CONGRESS EXTENDS THE BASIC (EMPLOYMENT ELIGIBILITY VERIFICATION) PILOT PROGRAM – Congress has extended for an additional two years the Basic Pilot Program for verifying employment eligibility that was created by section 401(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The program, through which employers can voluntarily enter into a memorandum of understanding with the Immigration and Naturalization Service and the Social Security Administration to verify the employment authorization of all their new hires, was set to expire in November 2001. The other employment eligibility verification pilot programs established by the IIRIRA—the Machine-Readable Document Pilot and the Citizenship Attestation Pilot—do not expire until May 2003 and June 2003, respectively.

The IIRIRA also required that the INS issue a report, based on an independent evaluation, reporting, among other things, whether the Basic Pilot Program had been successful and whether it had resulted in any discrimination against workers. Though the INS still has not complied with this requirement, Rep. Tom Latham introduced H.R. 3030 on Oct. 4, 2001, to extend the Basic Pilot Program. President Bush signed the bill into law on Jan. 16, 2002 (Public Law No. 107-128). The Basic Pilot Program will now expire in January 2004, since the amendment became effective this January 2002.

Immigrants & Welfare Update

FEDERAL AGENCIES REPUBLISH LEP GUIDANCE FOR COMMENTS; ADVOCATES SUBMITTING SUPPORTING COMMENTS – Nearly four months after the Dept. of Justice reaffirmed former President Bill Clinton's executive order directing federal agencies to publish guidance on serving limited English-proficient (LEP) persons, only a handful of agencies have issued them. Released on Oct. 26, 2001, the DOJ memorandum set out a four-part balancing test for agencies that provide federal funds and their recipients to use in assessing the scope of their obligations to provide language assistance. It also directed agencies to issue (or reissue, if they had already released them) guidance for public comment in light of the balancing test. Agencies were instructed to complete all revisions by late February 2002 (see "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). Because opponents of the executive order are expected to express their views forcefully, it is important for supporters of improving LEP persons' access to services to be equally vigorous in submitting comments.

Recipients of federal funding are required to provide LEP individuals reasonable access to their programs and services. Clinton issued Executive Order 13166 (published at 65 Fed. Reg. 50,121–22 (Aug. 16, 2000)) to ensure that LEP persons have meaningful access to programs and activities conducted and funded by the federal government, in accordance with Title VI of the Civil Rights Act of 1964. Title VI prohibits recipients of federal funds from discriminating on the basis of race, color, or national origin. Discrimination on the basis of national origin includes the failure to provide LEP persons with meaningful access to federally funded activities and programs.

With the change in presidential administrations, questions about the continuing validity of the Clinton order arose, prompting the Justice Dept. to release its clarifying memorandum. In addition to requiring agencies to issue or reissue their guidance, the memorandum directed agencies to determine (1) whether their guidance should be classified as rulemaking under the Administrative Procedures Act, triggering certain procedural requirements, and (2) whether their guidance constituted a "significant regulatory action" under Executive Order 12866, requiring review by the Office of Management and Budget. However, the DOJ, which was the first agency to republish its guidance, did not address these issues. Many advocates have criticized this omission, believing that other agencies were waiting to see how the DOJ addressed these issues before publishing their own guidance.

The memorandum also established aggressive timelines, requiring all revisions to be completed by Feb. 26, 2002. However, as of mid-February, only four agencies had published or republished guidance: the DOJ, the Dept. of Health and Human Services, the Corporation for National and Community Service, and the General Services Administration.

In expressing support for the rights of LEP persons, advocates emphasize that access to services for LEP persons is a civil right. The comments also address the benefits of providing access to LEP recipients, the costs of denying access to essential services, and effective models for providing access to services.

Questions to answer when evaluating agencies' guidance include:

1. Does the definition of recipients/beneficiaries make clear that sub-recipients are also bound by the guidance?
2. Does the guidance make clear that Title VI obligations extend to all of a recipient's activities, whether or not an activity is federally funded?
3. Does the guidance make clear that the "balancing test" set forth by the DOJ memorandum does not relieve funding recipients of their obligation to provide access? Are examples from the available range of language assistance services provided?
4. Are interpreter/translator competency standards addressed?
5. Are recipients required to affirmatively notify beneficiaries of their right to use an interpreter at no cost to them?
6. Does the guidance warn against the use of friends and family members as interpreters? Are formal arrangements and competency standards required for the use of community organizations and volunteers?
7. Is telephone contact addressed?
8. Are literacy issues addressed?
9. Are funding recipients advised to develop a comprehensive written policy to promote language access and to measure their performance under the policy?
10. Does the guidance direct funding recipients to assess the LEP population in their service area(s), including the languages most commonly spoken, and to update that assessment regularly?
11. Does the guidance direct recipients to train their staff on the requirements and strategies for providing language access, including work with interpreters and cultural competency issues?
12. Does the agency ask about costs? (Advocates emphasize that language assistance is a civil right and that the executive order clarified recipients' preexisting obligations under Title VI rather than imposing new obligations.)

Links to guidance documents, as they were published in the Federal Register, have been posted on the NILC web site, www.nilc.org. Click on "Immigrants and Public Benefits," then "Language Access." Materials and models comments developed by NILC staff are also posted.

SUBSTANTIAL RESTORATION OF IMMIGRANTS' FOOD STAMPS ELIGIBILITY PASSES SENATE

– In a major step forward for low-income immigrants, the Senate last week approved significant restorations of immigrants' eligibility for food stamps as part of its version of the Agriculture, Conservation, and Rural Enhancement Act of 2001 (S. 1731, "Farm Bill"). The Farm Bill, which passed by a 58-40 vote, includes \$8.9 billion over 10 years in increased spending on nutrition programs, including funding for expanding and simplifying the Food Stamp Program. Of this, about \$2.5 billion have been allocated to restoring food stamps to immigrants who are lawfully residing in the U.S. This would constitute the largest increase in safety net spending on immigrants in five years.

The most significant change in the immigrant eligibility provisions on the Senate floor came on an amendment by Sen. Richard Durbin (D-IL), cosponsored by Sen. Richard Lugar (R-IN). As offered, the Durbin-Lugar amendment was substantially the same as a change President George W. Bush recommended in his FY 2003 budget request. It would have restored food stamp benefits

to approximately 363,000 immigrants who are currently barred from obtaining assistance even though they have lived as qualified immigrants in the U.S. for five years or longer. As such, the amendment would have brought food stamps into conformity with several other major federal assistance programs, including Medicaid and Temporary Assistance for Needy Families (TANF), which impose a 5-year bar on immigrants' eligibility but no permanent bar on immigrants' access to benefits.

Unfortunately, Sen. Phil Gramm (R-TX) was able to water down significantly the Durbin-Lugar amendment with an amendment of his own. The Gramm language prevents most immigrants who have ever been in the U.S. unlawfully for a year or more from benefiting from the Durbin-Lugar amendment. The Gramm restriction would not apply to immigrants who currently qualify for food stamps or those who would qualify through one of the other provisions already included in the Farm Bill. But advocates' experience since the passage of the welfare law in 1996 suggests that the complexities of the Gramm amendment could create misinformation among immigrant communities, leading many eligible immigrants to refrain from obtaining needed assistance.

The Durbin-Lugar amendment, as amended by Gramm, passed the Senate by a vote of 96-1. A different version of the Farm Bill has already passed the House. The House bill only provides \$3.6 billion in new, 10-year funding cycles for nutrition programs and does not include any restorations of immigrants' eligibility for food stamps. The bill now goes to a conference committee that must resolve the differences between the House and Senate versions. In addition to the Durbin-Lugar amendment (as amended by Gramm), the Senate-passed Farm Bill would do the following:

- Reduce from 40 to 16 the number of qualifying quarters that a lawful permanent resident must work to be exempt from restrictions on immigrants' food stamp eligibility.
- Eliminate the date restriction limiting the eligibility of qualified immigrant children. Under current law, qualified immigrant children are exempt from immigrant restrictions only if they were lawfully residing in the U.S. on Aug. 22, 1996. Under the Senate Farm Bill, they would be exempt regardless of their date of entry.
- Eliminate the date restriction limiting the eligibility of qualified immigrants with disabilities. Under current law, qualified disabled immigrants are eligible only if they were lawfully residing in the U.S. on Aug. 22, 1996. As with qualified immigrant children, under the Senate Farm Bill, they would be exempt regardless of their date of entry.
- Eliminate the 7-year cap on the exemption for refugees, asylees, and others fleeing persecution. Under current law, these categories, including Cuban and Haitian Entrants and Amerasians, are exempt from immigrant restrictions for their first 7 years after obtaining the relevant status. The Senate bill would allow the exemption to continue indefinitely.

In addition to the immigrant provisions, the Senate adopted several amendments to the Farm Bill that increase overall funding for nutrition assistance and make significant additional improvements to the Food Stamp Program.

Sens. Bryon Dorgan (D-ND) and Charles Grassley (R-IA) sponsored an amendment that added about \$800 million over 10 years to the Food Stamp Program. Among other things, the amendment will increase benefits to low-income households with children and help provide more food assistance to poor families that

pay large portions of their income on rent and utilities. The Senate passed the Dorgan-Grassley amendment by voice vote after an attempt to table the amendment was defeated by a vote of 66-31.

Sen. Mitch McConnell (R-KY) sponsored an amendment adding about \$500 million over 10 years to the Food Stamp Program. The McConnell amendment will expand access to food stamps for low-income disabled persons and further increase benefit allotments for low-income families with children.

The House and Senate conference committee will meet the week of February 25 to iron out the differences between the two versions of the Farm Bill. Advocates will push hard to maintain the Senate's level of funding for nutrition programs, including provisions ensuring fair immigrant access to the Food Stamp Program. Clearly, the most favorable outcome would retain all of the Senate's immigrant provisions and remove Gramm's language. Advocates also support the other improvements proposed in the section of the Farm Bill addressing nutrition programs, including, importantly, program simplification.

TANF REAUTHORIZATION BILL INTRODUCED; WOULD RESTORE TANF AND SSI FOR IMMIGRANTS AND ADDRESS NEEDS OF LEP RECIPIENTS

Sponsored by Rep. Benjamin Cardin (D-MD), the "Next Step in Reforming Welfare Act" (H.R. 3625) would restore immigrants' eligibility for Temporary Assistance for Needy Families (TANF) and Supplemental Security Income (SSI) and help states better serve persons who are limited English-proficient (LEP). Introduced on Jan. 24, 2002, the legislation is cosponsored by four other members of the House Committee on Ways and Means: Reps. Lloyd Doggett (D-TX), Jim McDermott (D-WA), Sander Levin (D-MI), and Pete Stark (D-CA). (The Ways and Means committee has jurisdiction over the TANF and SSI programs). What follows is a summary of the provisions in the Cardin bill that assist low-income immigrants.

Elimination of five-year bar in TANF and imposition of three years of sponsor deeming. Currently, most qualified immigrants who entered the U.S. on or after Aug. 22, 1996, are subject to a five-year bar on assistance. After the five-year bar, the income of many immigrants' sponsors is "deemed" to be available to them until they become citizens or work for approximately ten years. This "sponsor deeming" rule renders most immigrants ineligible for services. Even if immigrants are eligible for assistance because their sponsor's income is very low, sponsors may need to reimburse the government for TANF benefits that the immigrant receives. Under Cardin's bill, the five-year bar on TANF benefits would be eliminated. However, three years of sponsor deeming would be imposed, with sponsor liability applying during the deeming period.

Restoration of SSI eligibility and imposition of five years of sponsor deeming. Currently, most immigrants who entered the U.S. on or after Aug. 22, 1996, are ineligible for SSI. The few eligible immigrants may have the income of their sponsors deemed as available to them until they become citizens or work for approximately ten years. The restrictive eligibility and deeming rules render most immigrants ineligible for assistance. Even if immigrants are eligible for assistance because their sponsor's income is very low, the sponsor may be liable for SSI benefits that the immigrant receives. Under Cardin's bill, SSI eligibility would be

restored for post–Aug. 22, 1996, entrants, with sponsor liability applying during the five-year deeming period.

Inclusion of ESL as a work activity. The 1996 welfare law established work “participation rates” for families receiving TANF assistance. To get credit under the work participation rates scheme, individuals must participate in one of a set of work-related activities listed in the statute. Currently, English as a second language (ESL) classes are not explicitly listed as a work activity. Several states allow ESL as “education related to employment” or as a “job readiness” activity—both of which are federal work activities. But, depending on the activity, there are limits on the period of time that recipients can participate or on the percentage of the caseload who can participate. Under Cardin’s bill, ESL classes would be considered a countable work activity, which would give states greater flexibility in choosing how best to serve their LEP population.

Other provisions relating to English proficiency. The Cardin bill would mandate a sanction review process that determines whether certain conditions, such as limited proficiency in English, may contribute to benefit recipients’ noncompliance with program requirements. Currently, federal law does not require states to conduct any review process before imposing sanctions on recipients. The bill would also require states to assess the recipient’s skills, prior work experience, and circumstances related to his or her employability, including English proficiency. Currently, the TANF statute does not explicitly require assessment of English proficiency. The Cardin bill would create an Employment Advancement Fund to focus on enhancing employment prospects for recipients facing barriers to employment, including lack of proficiency in English.

Other provisions of the bill that may benefit immigrants would

- Establish competitive state outreach grants to improve access to TANF, food stamps, Medicaid, the State Children’s Health Insurance Program (SCHIP), and other programs.

- Eliminate the limit on the numbers of TANF recipients engaged in vocational education who may be counted toward the work participation rate.

- Expand the list of work activities to include 6 months of services designed to improve future employment opportunities (states may define the type of services).

- Eliminate the separate work participation rate for two-parent families. Currently 90 percent of two-parent families must participate in work activities, while only 50 percent of single parent families must participate.

- Ban states from imposing stricter eligibility criteria for two-parent families, unless the state opts out. Under

current law, states are free to deny assistance to two-parent families. These policies harm immigrant and refugee families, which are almost twice as likely to be headed by a married couple as low-income U.S.-born families.

- Allow up to two years of vocational and educational training to be counted as a work activity. Currently, no more than 12 months of vocational and educational training are allowed as a work activity.

Advocates view the inclusion of immigrant restorations and LEP provisions in the moderate Democrats’ bill as a promising start to the TANF reauthorization debate. A Senate TANF bill has yet to be introduced.

2002 FEDERAL POVERTY GUIDELINES ISSUED – The U.S. Dept. of Health and Human Services has issued updated federal poverty guidelines that took effect Feb. 14, 2002. The guidelines, which serve as a basis for determining eligibility for many means-tested benefits, are updated yearly to reflect changes in the Consumer Price Index. Under the affidavit of support requirements created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, sponsors seeking to immigrate family members must establish that they have an income of at least 125 percent of the federal poverty guidelines. However, although the 2002 guidelines have already taken effect, the Immigration and Naturalization Service and consular posts will not use the new figures in connection with affidavit of support determinations until Apr. 1, 2002.

The table below contains the new guidelines.

Federal Poverty Income Guidelines

Family Unit Size	48 Contiguous States & D.C.	Alaska	Hawaii
1	\$8,860	\$11,080	\$10,200
2	11,940	14,930	13,740
3	15,020	18,780	17,280
4	18,100	22,630	20,820
5	21,180	26,480	24,360
6	24,260	30,330	27,900
7	27,340	34,180	31,440
8	30,420	38,030	34,980
For each additional family member, add:		3,850	3,540

67 Fed. Reg. 6,931–33 (Feb. 14, 2002).

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