



Immigration Issues

DOJ EXPANDS "CALL-IN" SPECIAL REGISTRATION, GRANTS EXTENSIONS OF THE REGISTRATION PERIODS FOR ALL GROUPS

The attorney general has published a notice in the Federal Register that applies the "call-in" special registration requirements of the National Security Entry-Exit Registration System (NSEERS) to additional nationalities, as well as two additional notices that grant extensions of the registration periods to individuals who were required to report under each of the four call-in notices that have been issued to date.

The notice designating additional nationalities for the NSEERS is the fourth such notice to be issued. It requires certain male citizens or nationals of Bangladesh, Egypt, Indonesia, Jordan, and Kuwait, who were inspected and admitted to the United States as nonimmigrants on or before Sept. 30, 2002, to report to the

Immigration and Naturalization Service to be registered. The notice required such individuals to appear in person at an INS office between Feb. 24 and Mar. 28, 2003, or face the possible loss of their status and be subject to removal; however, as explained below, the Group IV registration deadline has since been extended to Apr. 25, 2003. As was the case with the three prior notices that have been issued since Nov. 2002, the new requirement applies to individuals who were not given any notice concerning the special registration requirements at the time they were admitted to the U.S. as nonimmigrants.

The other two new notices provide additional registration periods for individuals who were required to register by one of the four call-in notices (i.e., for persons in Groups I, II, III, or IV) designating nationalities for the NSEERS.

The first call-in notice required categories of nationals of Iran, Iraq, Libya, Sudan, and Syria (Group I) to register by Dec. 16,

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

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

2002; the second required nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen (Group II) to register by Jan. 10, 2003. (For more information about the first two notices, see "DOJ Requires Certain Nonimmigrants Admitted to the U.S. before Sept. 11, 2002, to Appear for 'Special Registration' by Dec. 16, 2002," IMMIGRANTS' RIGHTS UPDATE, Nov. 22, 2002.) The third call-in notice required certain nationals of Pakistan and Saudi Arabia (Group III) to register between Jan. 13 and Feb. 21, 2003 (however, as explained below, *the Group III deadline has since been extended to Mar. 21, 2003*). Although Armenia was initially listed on the third notice, the INS later issued a press statement explaining that the listing was in error. On Dec. 18, 2002, the agency published a revised version of the notice that did not include Armenia as a designated country.

Immigrant communities have experienced substantial confusion and fear concerning the call-in program, particularly in the wake of massive arrests made at some INS offices of people in Group I who came forward to register. Many registrants were detained and placed in removal proceedings for technical violations of status, including individuals who had applied to adjust status and had been granted employment authorization.

In response to widespread criticism of the Group I arrests, INS offices have generally decided against detaining individuals with pending adjustment cases, absent criminal or other adverse factors. The first notice providing for an additional registration period was issued in recognition of the fact that many people required to register in Groups I and II did not get notice of the requirements. Under the notice, such persons now have from Jan. 27 through Feb. 7, 2003, to register. The Federal Register notice announcing the additional period also clarifies that registration during this period "will be considered to have been made in a timely fashion." A subsequent Federal Register notice extends the deadline for Group III to Mar. 21, 2003, and the registration period for Group IV to the period from Feb. 24 through Apr. 25, 2003.

The requirements announced in the fourth call-in notice (Group IV) apply to males born on or before Feb. 24, 1987 (i.e., those who are 16 years old or older); who are nationals or citizens of Bangladesh, Egypt, Indonesia, Jordan, or Kuwait who were inspected and last admitted to the U.S. as nonimmigrants on or before Sept. 30, 2002; and who will remain in the U.S. until after Mar. 21, 2003.

The notice states that the call-in special registration requirements apply to individuals who are nationals or citizens of the designated countries even if they hold dual nationality or citizenship with another country not specified in the notice. The notice exempts lawful permanent residents, individuals who had asylum applications pending on Jan. 16, 2003, asylees, and foreign diplomats from the special registration requirements. By its terms, the call-in requirement applies only to individuals whose last entry was as a nonimmigrant; therefore, it would not apply to individuals who entered the U.S. without inspection or who were paroled into the country.

To register, such individuals must appear before an immigration officer at one of the locations listed in the appendix to the notice at some time between Feb. 24 and Apr. 25, 2003. Accord-

ing to the notice, registrants must present travel documents, including a passport, a Form I-94 issued upon admission, and any other forms of government-issued identification; proof of residence, including any land title, lease, or rental agreement; proof of matriculation at an educational institution (if applicable); and proof of employment (if they are employed). The notice also states that such registrants must present any other information requested by the immigration officer. Once registered as part of the NSEERS program, registrants must appear before the INS annually, within ten days of the anniversary of their registry date. They must also report any change of address on Form AR-11 within ten days of any move to a new residence or address, and when they leave the U.S. they must depart from a specified port of entry and register again upon departure.

68 Fed. Reg. 2,363-66 (Jan. 16, 2003) (Group IV);  
68 Fed. Reg. 2,366-67 (Jan. 16, 2003) (new period for  
Groups I and II); 68 Fed. Reg. 8,046-47 (Feb. 19, 2003)  
(extending periods for Groups III and IV).

#### **DEPT. OF HOMELAND SECURITY: IMMIGRATION ENFORCEMENT RESTRUCTURED, APPOINTMENTS FOR NEW DEPT. MADE**

The relocation of immigration services and enforcement into the Dept. of Homeland Security (DHS) has begun. As previously reported, enforcement was to be located in the Bureau of Border Security within the huge Border and Transportation Security Directorate in the DHS. Immigration services are not located in any of the directorates. They are instead to be handled by a free-floating component called the Bureau of Citizenship and Immigration Services.

On Jan. 30, 2003, President George W. Bush submitted to Congress a modification to the Homeland Security reorganization plan, which somewhat changes the arrangement of enforcement responsibilities. Under the new configuration, one bureau within the Border and Transportation Security Directorate will deal with inspections and enforcement on the border, and another bureau in the same directorate will deal with investigations and enforcement once the border is crossed.

**At the Border.** The Bureau of Customs and Border Protection will combine Immigration and Naturalization Service inspections services, Border Patrol, Customs Service (including canine officers), and the Agricultural Quarantine Inspection program. It will be directed by the Customs commissioner, who will report to the undersecretary for Border and Transportation Security. This new bureau will bring together about 30,000 employees and will focus on the movement of people and goods across the border.

**Once the Border Is Crossed.** The Bureau of Border Security (established in the 2002 DHS legislation) will be renamed the Bureau of Immigration and Customs Enforcement. It will bring together the investigative and enforcement functions of the INS and of the Customs Service, and Federal Protective Services. This bureau will focus on enforcing immigration and customs laws within the interior of the U.S. It will be headed by an assistant secretary who will report directly to the undersecretary for Border and Transportation Security.

This modification does not explain how the two bureaus responsible for enforcement will coordinate their activities, or how

they will coordinate with the services bureau. As previously reported, the Bureau of Citizenship and Immigration Services will remain a separate bureau and focus exclusively on immigration and citizenship services.

This reorganization plan will take effect on Mar. 1, 2003.

Meanwhile, appointments to the new department continue. Tom Ridge was confirmed as DHS secretary. Asa Hutchinson, former head of the Drug Enforcement Administration, was confirmed as undersecretary for Border and Transportation Security. Customs Commissioner Robert C. Bonner has been named head of the Bureau of Customs and Border Protection. The Bureau of Immigration and Customs Enforcement will be headed by Michael Garcia, who has been acting INS commissioner since Nov. 2002. He is a career federal prosecutor who participated in a series of antiterrorism prosecutions. The White House has also announced that Eduardo Aguirre Jr., currently vice chairman and first vice president of the Import-Export Bank, will be named director of the Bureau of Citizenship and Immigration Services. He previously worked for Bank of America for 24 years. Until a replacement for his Import-Export Bank post is named, Aguirre will serve in both positions simultaneously.

According to the DHS Fiscal Year 2004 Budget Fact Sheet, President Bush has also announced that his FY 2004 budget requests for the DHS an allocation of \$36.2 billion, a 7.4 percent increase in funding over FY 2003 and a 64 percent increase over FY 2002. This includes \$18.1 billion for the Border and Transportation Security Directorate alone. The budget request also includes \$100 million in new resources for the comprehensive entry-exit system, for a total of \$480 million for that program. Finally, the budget request continues the president's \$500 million initiative to reduce the backlog of applications.

**JUSTICE DEPT.'S "PATRIOT II" BILL WOULD MAKE SWEEPING IMMIGRATION CHANGES**—The U.S. Dept. of Justice has drafted new antiterrorism legislation that would broadly expand the government's authority to conduct surveillance, wiretapping, detention, and criminal prosecution of citizens, and would also make sweeping changes to immigration law. Among other things, the bill would expand the circumstances in which U.S. citizens can be stripped of citizenship and provide for the removal of lawful permanent residents without a hearing and with no recourse to relief, if they have been convicted of a controlled substance offense, a firearms offense, an aggravated felony, or various other offenses.

The bill, titled the "Domestic Security Enhancement Act of 2003" and also known as the "Patriot Act II," has not been officially released by the DOJ, but a draft was obtained and posted on the Internet by the Center for Public Integrity, at [www.incunabula.org/DSEA/INDEX.HTM](http://www.incunabula.org/DSEA/INDEX.HTM). A section-by-section analysis of the entire draft bill is available at the Web site of the American Civil Liberties Union, [www.aclu.org](http://www.aclu.org). A brief summary of some of the bill's immigration provisions follows below.

**Expanded Expatriation of U.S. Citizens.** Section 501 of the bill broadly expands the circumstances in which individuals can be stripped of U.S. citizenship. Among other things, the bill would allow for the expatriation of citizens who provide material support to a terrorist organization engaged in hostilities "against the United

States, its people, or its national security interests."

**Increasing Criminal Penalties for Immigration Violations.** Section 502 increases the criminal penalties for entry without inspection, reentry after removal, alien smuggling, failure to register if required to do so, failure to carry a certificate of registration or alien registration receipt ("green") card at all times, failure to notify the Immigration and Naturalization Service of a change of address within ten days of the change, making fraudulent statements in connection with registration, and unlawful voting.

**Barring Admission to and Removing Noncitizens Whom the AG Considers Pose a Threat to National Security.** Section 503 establishes new grounds of inadmissibility and removability for noncitizens about whose presence or activities in the U.S. the attorney general "has reason to believe" would pose a danger to national security. The provision also adds grounds of inadmissibility and removability for noncitizens whom the attorney general has reason to believe have been charged with or committed a serious criminal offense in another country.

**Expediting Removal of Lawful Permanent Residents.** Section 504 of the bill provides for the summary removal, with no discretionary relief available and without a hearing, of LPRs as well as other noncitizens who have been convicted of a controlled substance offense, a firearms offense, an aggravated felony, or certain other offenses. The provision bars federal habeas corpus review of such orders by federal district courts, reduces from 30 days to 14 days the time to seek judicial review in the court of appeals of such orders, and limits the issues in such an appeal to determining (1) whether the individual is an alien, and (2) whether the individual is subject to a final judgment of conviction for one of the specified categories of offenses.

**Prohibiting Stays of Removal in Most Cases.** Section 504(d) of the bill would amend section 242(f)(2) of the Immigration and Nationality Act to make that provision's stringent standard for granting injunctions of removal orders applicable to the authority of the federal courts to stay removal pending their judicial review of removal orders. This seeks to reverse the rulings of four courts of appeals that have found that sec. 242(f)(2) does not apply to such stays. *Mohammed v. Reno*, 309 F.3d 95 (2d Cir. 2002); *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001); *Andrieu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (*en banc*); *Lal v. Reno*, 2000 WL 831801 (7th Cir. June 26, 2000) (unpublished); *but see Weng v. Attorney General*, 287 F.3d 1335 (11th Cir. 2002). In rejecting the interpretation that this bill would enact, one court noted that "this would effectively require the automatic deportation of large numbers of people with meritorious claims, including every applicant who presented a case of first impression." *Andrieu*, 253 F.3d at 482.

**Allowing Removals to Countries with No Government.** Section 506 of the bill would allow the attorney general to direct the removal of a noncitizen to another country or region, even where the removal would, under the current language of INA sec. 241(b), be considered impracticable, inadvisable, or impossible. The provision allows such removal "regardless of whether the country or region has a government, recognized by the United States or otherwise." This provision is clearly intended to overrule the recent injunction of removals to Somalia (for more regarding this injunction, see "District Court Enjoins Removals to Somalia," p.10).

**BILLS TO PROHIBIT FOREIGN I.D. DOCUMENTS WOULD UNDERMINE NATIONAL SECURITY**—Anti-immigration groups have recently proposed bills that would, in effect, prohibit the federal government from accepting or relying on foreign government-issued identification documents presented in obtaining a public benefit or service in the U.S. H.R. 502, introduced by Rep. Tancredo (R-CO) on Jan. 29, 2003, provides that in providing a benefit or service requiring proof of identification, federal entities can accept only an I.D. document that is issued by a federal or state authority and verifiable by federal law enforcement, intelligence, or homeland security agencies. H.R. 687, introduced by Rep. Gallegly (R-CA) on Feb. 11, 2003, would establish a similar prohibition. Similar bills have been introduced in several state legislatures.

These proposals do nothing to protect national security and are based on false assumptions about foreigners and the government-issued identity documents that they legitimately have and use. Their passage would prevent foreigners from entering the country, obtaining lawful status, doing business, going to school, and engaging in virtually every aspect of daily life and commerce. The consular identity document (*matrícula consular*) issued by the Mexican government appears to be the primary target of the bills, but in fact a huge range of widely accepted documents from every country in the world would be affected.

It must be kept in mind that foreign identity documents are not immigration documents. They do not “legalize” immigrants, nor give them amnesty. Foreign identification documents also do not give their holders permission to enter or work in the U.S., or allow them to do anything that is prohibited by law.

The proposed legislation is flawed in the following ways:

*It is overly broad.* The proposals would prohibit the federal government from accepting or relying on identification documents presented in obtaining public benefits or services in the U.S., unless the documents are issued by a federal or state authority and subject to verification by a federal law enforcement, intelligence, or homeland security agency. This sweeping language would preclude the use of a vast array of commonly accepted identity documents issued by countries around the world for their citizens, including passports, consular identification cards, birth certificates, foreign driver’s licenses, and school identification cards. Obtaining an identity document issued by a federal or state authority in the U.S. would be an impossibility for many noncitizens, whether documented or not.

*It would have absurd consequences.* The term “public benefit or service” used in proposed legislation covers an enormous range of government activities, and rejection of all foreign identification documents will produce absurd results. Proof of identity is needed to enter the U.S., obtain lawful status, enter a federal building to go to an Immigration and Naturalization Service or Internal Revenue Service office, get a library card at the Library of Congress, pass through security checks in an airport, board a train, or pick up a package at the post office. A requirement of a U.S. federal or state identification document could well put these basic activities out of reach for many noncitizens.

*It wrongly presumes that all foreign identification documents are unreliable.* The proposals presume that only the United States is capable of issuing identity documents that are secure and authentic. This is not true. For example, the Mexican gov-

ernment-issued *matrícula consular* requires the same proof of nationality and identity that is required for issuance of a Mexican passport, including an original birth certificate and official photo identification card. And applicants for the *matrícula consular* must also submit proof of residence, which is not required for the passport.

The identity card contains security safeguards designed to prevent falsification and to ensure that law enforcement officials from Mexico and the U.S. are able to determine the authenticity of the document. Each card bears a photo of the applicants taken at the consulate, a legal address, signature, and serial number. Cards are printed on green security paper with the official Mexican seal and have a hologram of the Foreign Affairs Ministry (SRE) seal that appears over the cardholder’s picture. Under fluorescent light, “SRE” can be read over the entire front of the card. The card’s reverse side also has an infrared band running across the top. A decoder is required to read invisible security marks. Mexican consulates have distributed decoders to law enforcement officials throughout the U.S.

Other factors to take into account when evaluating the proposed legislation include the following:

*It is dangerous to automatically equate immigrants with terrorists.* Rejection of all foreign identity documents is based on the unsupportable premise that all immigrants, documented or undocumented, are a threat to U.S. national security. Measures that treat all immigrants as suspected terrorists are dangerous because they undermine national security in a number of ways. They alienate foreigners who have no hostile intentions toward the U.S. They cause immigrants to distrust the government and to fear cooperation with the authorities. They are harmful distractions that draw enormous resources away from common sense law enforcement measures that have proven to protect against terrorism.

*Establishing identity is a law enforcement tool.* Law enforcement and other public safety agencies need to be able to use all available tools to quickly establish the identity of members of the public. Rejections of all foreign identity documents would undermine national security by preventing noncitizens from presenting documents that establish who they are. For that reason, many law enforcement agencies have endorsed the use of Mexican consular identity documents to establish identity.

*U.S. citizens would face retaliation from other countries.* The proposed legislation rejects the very same sort of documents that U.S. citizens use when they go to other countries. If those countries respond in kind, U.S. travelers will face the same inability to travel, work, live, do business, and study that noncitizens will face here.

Protection of national security is of the utmost importance. But it can only be accomplished through strategic measures that target terrorism. Wholesale rejection of foreign identity documents will not only be ineffective against terrorism, but, by hampering law enforcement, it will compromise national security even further.

**THOUSANDS OF APPLICATIONS AND OTHER DOCUMENTS SHREDDED AT INS CALIFORNIA SERVICE CENTER** – A federal grand jury has in-

dicted two workers at the Immigration and Naturalization Service's California Service Center on charges that the two workers destroyed tens of thousands of documents. According to press reports, as many as 90,000 documents may have been destroyed, including applications for asylum, naturalization, adjustment of status, and employment authorization, as well as visa petitions, passports, and birth and marriage certificates. One of the workers, a file room manager, is alleged to have ordered contract workers to shred the documents in order to eliminate a backlog of unprocessed documents. The other indicted worker is a contract supervisor who participated in the shredding.

In a Jan. 30, 2003, statement, the INS stated that the indictments resulted from the agency's Apr. 2002 discovery of the shredding. According to the statement, the INS responded to the shredding by urging individuals who filed applications and petitions at the service center but did not receive a receipt for the filing to call a hotline (949-831-8427) to inquire about the status of their cases. Individuals who did receive receipts could also use the hotline to check on the status of their cases. According to the statement, the service center has also assisted applicants in reconstructing cases where the file could not be found. The agency has also remailed to applicants all requests for additional information that were sent out during the period that the shredding took place.

**SEATTLE ADOPTS ORDINANCE PREVENTING INQUIRIES ON IMMIGRATION STATUS** – On a unanimous vote of 9 to 0, the Seattle City Council voted to adopt an ordinance that prohibits city employees from inquiring into the immigration status of people with whom they deal in the course of doing their jobs. Spearheaded by advocacy organizations such as the Hate Free Zone, the Northwest Immigrants Rights Project, and the Washington Defenders Immigration Project, as well as a coalition of 35 organizations, the ordinance, which was approved on Jan. 27, 2003, was in direct response to post-9/11 enforcement initiatives proposed by the U.S. Dept. of Justice (DOJ).

Last spring, the *San Diego Union* reported that the DOJ was planning to depart from a 1996 legal opinion which concluded that state and local police lack the legal authority to enforce the civil provisions of immigration law. After numerous police chiefs associations decried the proposed DOJ policy, the department refused to make its opinion public. Nevertheless, the attorney general and other Bush administration officials have continued to suggest that state and local law enforcement authorities have "inherent authority" to engage in such enforcement (*see* "Policies to Permit Police to Enforce Immigration Law Could Undermine Public Safety, Violate Civil Rights," IMMIGRANTS' RIGHTS UPDATE, Nov. 22, 2002, p. 4). As a result, many communities are attempting to find ways to affirmatively safeguard community policing efforts—which rely on heightened trust between all community members and police—that have proven effective in deterring crime.

The Seattle ordinance codified an existing police department directive barring inquiries into individuals' immigration status and expanded it to include all city employees. Under the ordinance, city officials may not inquire about an individual's immi-

gration status or engage in activities designed to ascertain such status. The police are exempted from making inquiries when they have a reasonable suspicion that the individual has been previously deported from the United States, is present in the U.S., and is committing or has committed a felony.

The Seattle ordinance attempts to provide protections for immigrants while also complying with provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Under the IIRIRA, federal, state, and local government entities or officials are barred from prohibiting or in any way restricting communications between such entities and the Immigration and Naturalization Service. The Seattle ordinance does not restrict such communications from taking place. Rather, it simply prohibits entities from making any inquiries into the immigration status of the people they serve. Thus, it complies with the mandates of the IIRIRA.

Since the news of the ordinance has become public, other local communities have introduced similar legislation. NILC is in the process of assembling some materials on these issues and will provide technical assistance to advocates engaged in similar efforts. For more information, contact Sara Campos at 510-663-8282 x.304 or Linton Joaquin at 213-639-3900 x.111.

**DOJ ISSUES RULE FOR INDOCHINESE PAROLEE ADJUSTMENT**—The U.S. Dept. of Justice (DOJ) has issued final regulations implementing a statute under which Vietnamese, Cambodian, and Laotian nationals who were paroled into the United States as of Oct. 1, 1997, and who have been present here since that date may adjust status to lawful permanent residence. The final rules, published Dec. 26, 2002, set forth eligibility criteria and adjudication procedures for the adjustment program and set a three-year adjudication period for accepting applications. The rule became effective on Jan. 27, 2003.

In the late 1980s, when many Southeast Asians were fleeing their ravaged countries on makeshift boats, the U.S. instituted humanitarian measures allowing many to be admitted to the U.S. as "parolees," as an alternative to admitting them as "refugees." Parolees are individuals who are allowed into the U.S. for emergency, humanitarian, or other purposes that are in the public interest. Indochinese parolees may legally work in the U.S. but, despite their longstanding presence in this country, they have been unable to obtain lawful permanent residence. To redress this problem, in 2000 Congress passed section 586 of P.L. 106-429 to allow Indochinese parolees to adjust their status to permanent residence. The DOJ is only now putting into effect regulations to implement that law.

**The 5,000 Adjustments Cap.** When it passed the statute, Congress set a cap of 5,000 for all new adjustments under the program. Throughout the legislative and rulemaking process, advocates maintained that such a cap would deny the program's benefits to many Indochinese parolees who otherwise would be eligible to adjust under the law. The DOJ, in acknowledging this problem, stated that while the Immigration and Naturalization Service will stop adjudicating applications after the 5,000 new adjustments limit is reached, it will track how many applications are filed under the program and, when the cap is reached, will

inform Congress and the public how many applicants failed to adjust because of the cap. However, the INS will not retain the applications it receives after the cap is reached; rather, it will log, in chronological order according to the time applications are filed, the names of applicants who file after the cap is reached. Applications filed after the cap is reached will be returned to the applicants along with a dated notice encouraging them to retain the documents in the event that the cap is expanded or eliminated. However, if the cap is reached and Congress opts to eliminate or expand the cap, the INS would exercise its discretion to retain all applications filed, along with their related fee payments.

**"Place in Line" Determined by Waiver Approval Date.** The INS will process applications requiring certain waivers of inadmissibility according to the date the waiver is approved rather than the date the application is received—i.e., such applicants' "places in line" will be determined by when their waivers are granted. The inadmissibility waivers that trigger this provision are those for the criminal, fraud, immigration violations, citizenship ineligibility, and illegal voting grounds.

**Eligibility.** The INS may adjust the status of nationals or citizens of Vietnam, Cambodia, and Laos who:

- were inspected and paroled into the U.S. as of Oct. 1, 1997;
- were paroled into the U.S. from Vietnam under the rubric of the Orderly Departure Program (ODP) from a refugee camp in East Asia or from a displaced persons camp administered by the United Nations High Commissioner for Refugees in Thailand;
- were physically present in the U.S. prior to and on Oct. 1, 1997;
- file an adjustment of status application during the three-year period starting Jan. 27, 2003; and
- are admissible in accordance with the admissibility rules specific to this program.

**Application Period.** The rule sets forth a three-year application period beginning on Jan. 27, 2003, and ending on Jan. 25, 2006. The INS will accept applications after that period but only if the 5,000 adjustments limit has not been reached and the application bears an official postmark dated on or before the final day of the application period. The rule provides that application packets with illegible or missing postmarks will be considered timely filed if they are received within three business days after Jan. 25, 2006.

**Application Procedures.** Applicants must be physically present in the U.S. to adjust their status under this program. They must submit Form I-485 (Application to Register Permanent Residence or to Adjust Status) with payment of a \$186 or a \$160 fee, depending on whether they are older or younger than 14 years of age. Applicants ages 14 through 79 also must submit a \$50 fingerprinting fee payment, two photographs, a complete G-325A form (Biographic Information), Form I-693 (Medical Examination of Aliens Seeking Adjustment of Status) and, if applicable, an application for a waiver of inadmissibility.

The rules instruct applicants to write "INDOCHINESE PAROLEE, P.L. 106-429" under Part 2, Question H of the I-485. Applicants must include evidence establishing their eligibility and send their completed application packets to the INS service center in Lincoln, Nebraska (INS Service Center, P.O. Box 87485, Lincoln, NE 68501-7485).

**Applicants in Removal Proceedings or with Final Orders.** Under

the rules of this program, only the INS may adjudicate Indochinese parolees' adjustment of status applications. Parolees who are in removal proceedings must request the INS's consent to file a joint motion for administrative closure. Neither the immigration judge presiding over the proceedings nor the Board of Immigration Appeals may dismiss or defer the proceedings without the INS's consent.

Persons seeking to adjust status under this program who have final orders of removal, deportation, or exclusion must submit their applications to the INS. However, such an application does not automatically stay the order of removal, deportation, or exclusion. Individuals must separately request a discretionary stay with the INS district director who has jurisdiction over the individual's case. The rules for seeking such a stay are found at 8 CFR sec. 241.6.

**Grounds of Inadmissibility.** Under the statute, certain grounds of inadmissibility do not apply to Indochinese parolee adjustment. These include the grounds under INA secs. 212(a)(4) (public charge), 212(a)(5) (labor certifications), 212(a)(7) (documentation requirements), and 212(a)(9) (unlawful presence).

Many other grounds of inadmissibility may be waived. Inadmissibility under INA secs. 212(a)(1) (health), (a)(6)(B) (failure to attend removal proceedings), (a)(6)(C) (misrepresentation), (a)(6)(F) (subject of civil penalty), (a)(8)(A) (ineligibility for U.S. citizenship), (a)(10)(B) (guardian required to accompany helpless immigrant), and (a)(10)(D) (unlawful voters) may be waived if the applicant demonstrates that the waiver is necessary to prevent extreme hardship to the applicant, his or her spouse or parent, or a U.S. citizen or lawful permanent resident son or daughter. The applicant may also apply for any other waiver of inadmissibility under INA sec. 212 by filing Form I-601.

**Evidence Required.** The rule creates a new section within the regulations that lays out the requirements concerning the evidence applicants must present to demonstrate that they were physically present in the U.S. on a specific date. This rule applies to Haitians applying for adjustment under the Haitian Refugee Immigration Fairness Act of 1998 and may be applied to other adjustment of status programs in the future.

To establish that they were physically present in the U.S. on a specific date, applicants may submit INS-issued documents. The rule provides some examples of INS documents that are acceptable as proof but explicitly states that additional documents may also be presented. Some of the documents noted in the rule are the following: Form I-94 (Arrival-Departure Record), Form I-862 (Notice to Appear), Form I-221 (former Order to Show Cause), or any application for a benefit under the INA filed by or on behalf of the applicant on or prior to the date on which it is required that the applicant have been present in the U.S. INS fee receipts are also acceptable proof.

Other types of government documentation also may be presented as proof of physical presence as of the required date. Such documentation must bear the signature, seal, or other authenticating instrument of the governmental authority (if the document normally bears such an instrument); it must be dated at the time of issuance; and its issuance date must not be later than the required date. Examples of such documents include but are not limited to the following: a state driver's license, a state I.D. card,

a county or municipal hospital record, a public college or public school transcript, tax records, or a certified copy of a federal, state, or local governmental record. The applicant may also submit any other relevant documents, and the adjudicator will consider them on a case-by-case basis.

The rule also allows applicants to present transcripts or enrollment records provided by private or religious schools that are registered, approved, and licensed and that maintain enrollment records in accordance with state or local requirements. Such evidence will be accepted only to document the physical presence of an applicant who attended the school and who is under 21 years old on the date that he or she is required to have been in the U.S. in order to qualify for adjustment.

The applicant bears the responsibility of providing copies of the applicable government records. Applicants who do not possess certain documents but believe that their INS file contains them may submit a statement with the name and location of the government agency that issued the document, the type of document issued, and its issuance date.

Under the rule, applicants who can find no document to establish that they were physically present as of the required date may submit several documents showing that they were physically present in the U.S. prior to and after that date.

67 Fed. Reg. 78,667 (Dec. 26, 2002).

**AG ISSUES INTERIM RULE TO RESTRICT 212(h) WAIVERS** – The attorney general has issued an interim rule that dramatically restricts the circumstances in which waivers may be granted under section 212(h) of the Immigration and Nationality Act. Section 212(h) provides a waiver of certain criminal grounds of inadmissibility for non-U.S. citizens applying for admission to the United States or adjustment of status to lawful permanent residence. The interim rule establishes a general rule that waivers will be denied in cases involving violent or dangerous crimes except in “extraordinary circumstances.” Extraordinary circumstances include cases in which there are overriding national security or foreign policy considerations or the applicant has demonstrated that a denial would result in exceptional or extremely unusual hardship. Depending on the gravity of the crime, such circumstances may not be sufficient to warrant the grant of a waiver.

The interim rule took effect on Jan. 27, 2003.

67 Fed. Reg. 78,675–78 (Dec. 26, 2002).

**ATTORNEY GENERAL TERMINATES TPS DESIGNATION FOR ANGOLA** – Attorney General John Ashcroft has decided to terminate the designation of Angola under the temporary protected status program when the current designation expires on Mar. 29, 2003. The decision, announced in a notice published in the Federal Register, is based on improvements in conditions in the country, including the end of armed conflict between the Angolan government and UNITA. The notice acknowledges the continued existence of “challenging circumstances” that continue to pose threats to civilians, but does not indicate that the attorney general gave any consideration to granting deferred enforced departure (DED) to Angolans, as has been done with some other nationalities at

the termination of a TPS designation.

In terminating the TPS designation, the attorney general noted that an insurgency separate from UNITA continues in the province of Cabinda and that the Angolan government “has increased its military campaign against rebels in this area.” However, the U.S. State Dept. considers that because Cabinda is geographically isolated from the rest of Angola, “conditions in that province do not impact Angolans elsewhere.”

The notice also acknowledges that “Angola faces the challenge of assisting an estimated 4 million displaced Angolan nationals” and the country “lacks housing, medical services, water systems, and other basic services destroyed by a 27-year-long war.” Moreover, there are “as many as 8 million landmines planted in Angolan soil,” and “[a]t least 10 provinces, accounting for 40 percent of Angola’s countryside, are heavily mined, rendering large areas of arable land and pasture unfit for use.”

DED status was granted to Salvadorans in the early 1990s and to Liberians in 1999, when the attorney general determined that country conditions no longer met the statutory requirements for TPS designation but that important considerations warranted against conducting forcible removals to those countries. However, the notice makes no mention of this option, noting only that Angolans “who believe that their particular circumstances make return to Angola unsafe” may seek asylum, withholding of removal, or protection under Article 3 of the Torture Convention.

68 Fed. Reg. 3,896–7 (Jan. 27, 2003).

**BIA: SERVICE OF NTA BY CERTIFIED MAIL ON CORRECT ADDRESS IS ADEQUATE, EVEN IF RETURNED AS “UNCLAIMED”** – The Board of Immigration Appeals has issued a precedent decision finding that an attempted delivery of a Notice to Appear (NTA) by certified mail to a respondent’s correct address constitutes adequate service despite the fact that the mailing was returned as “unclaimed.” In so doing, the BIA rejected the respondent’s contention that because first class mail is more reliable than certified mail, the immigration court should have used the former in serving the documents. The decision distinguishes the BIA’s decision in *Matter of G-Y-R-*, 23 I. & N. Dec. 181 (BIA 2001), on the basis that in this case there is no dispute that the NTA was mailed to the correct address.

The respondent in this case is a native of Guinea who entered the U.S. without inspection in Feb. 2000, and applied for asylum in Nov. 2000. Eight days after the application was filed, an asylum officer referred the application to the immigration court. An NTA and notice of hearing were then mailed by certified mail to the address provided on the asylum application. According to postal records, two attempts were made to deliver the certified mail, and on each occasion a notice was left at the address indicating that the post office was holding mail for the respondent. When no one claimed the envelope, it was returned marked “unclaimed.”

The respondent failed to appear for the hearing, and the immigration judge thereupon entered an *in absentia* order of removal. Subsequently, the respondent filed a motion to reopen, seeking to apply for asylum and asserting that he had checked the mail every day but did not receive any notice of hearing. The IJ denied the motion, finding that service of the NTA and notice of

hearing was proper. The respondent appealed.

On appeal, the BIA upheld the denial of the motion to reopen. The BIA rejected the respondent's contention that first class mail delivery is more reliable than certified mail, noting that certified mail has been used by the Immigration and Naturalization Service and the immigration courts for many years. Moreover, in this case there was no evidence that the respondent had not received the postal notices stating that a certified mailing was being held for him at the post office. The BIA concluded that it was not reasonable "to allow the respondent to defeat service by neglecting or refusing to collect his mail."

As previously noted, the BIA distinguished its decision in *Matter of G-Y-R* on the basis that in this case there was no claim that the NTA and notice of hearing were mailed to an incorrect address. In *G-Y-R*, the NTA was mailed to the address that the respondent had provided on an asylum application. However, the respondent had moved to a new address after filing the application, without having received notice from the immigration court of the obligation to inform the court of any change of address (for more on *G-Y-R*, see "BIA: In Absentia Removal Order May Not Be Entered Where the Record Reflects That Respondent Did Not Receive Mailed NTA," IMMIGRANTS' RIGHTS UPDATE, Nov. 16, 2001, p. 7).

*Matter of M-D*, 23 I. & N. Dec. 540, Int. Dec. 3485 (BIA Dec. 18, 2002).

**BIA: LPR WHO OBTAINED STATUS THROUGH FRAUD OR MISREPRESENTATION NOT ELIGIBLE FOR LPR CANCELLATION** – The Board of Immigration Appeals has ruled in a precedent decision that an immigrant who obtained lawful permanent resident status through fraud or misrepresentation is not eligible for cancellation of removal under section 240A(a) of the Immigration and Nationality Act. The BIA found that the respondent was never "lawfully admitted for permanent residence" and therefore did not qualify for LPR cancellation.

The respondent in this case, a Mr. Koloamatangi, obtained LPR status in 1985 on the basis of his purported marriage to a U.S. citizen. However, the BIA found that the marriage was knowingly invalid, because Kolomatangi was married to someone else at the time. When he was subsequently placed in removal proceedings, he sought to apply for cancellation of removal under INA sec. 240A(a). This relief is available to immigrants who have been "lawfully admitted for permanent residence for not less than five years," have resided continuously in the U.S. for at least seven years after any admission, and have not been convicted of an aggravated felony.

At Kolomatangi's removal hearing, the immigration judge determined that, although Kolomatangi was granted LPR status and subsequently resided in the U.S. for more than the requisite five years, he was not eligible for relief under the statute because his LPR status was obtained through fraud. The IJ also denied Kolomatangi's request for voluntary departure because of the fraud. The IJ indicated that he would consider a motion to reopen by Kolomatangi to apply for non-LPR cancellation of removal. However, the IJ also stated that he would likely find Kolomatangi ineligible for this relief as well, for lacking good moral character.

Kolomatangi appealed the IJ's decision to the BIA. In 2001 the appeal was summarily dismissed because Kolomatangi had failed to file a written brief. However, he then filed a motion to reopen, explaining the failure to file a brief and seeking to submit an appellate brief. The BIA granted this motion and ruled on the appeal.

On appeal, Kolomatangi relied on 8 CFR sec. 1.1(p) to argue that he should be eligible for LPR cancellation. That regulation repeats the statutory definition of "lawfully admitted for permanent residence" (found at INA sec. 101(a)(20))— i.e., "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." However, since 1996 the regulation also has included the following sentence: "Such status terminates upon entry of a final administrative order of exclusion or deportation." Based on this last sentence, Kolomatangi argued that he should be considered an LPR because he was granted the status and did not have a final order terminating it entered against him.

The BIA rejected this argument, noting longstanding precedent that an individual who obtains LPR status through fraud or misrepresentation "has not made a lawful entry upon which to base eligibility for relief" (citing *Matter of T*-, 6 I. & N. Dec. 136 (BIA, AG 1954)). The BIA noted that the 1996 amendment to the regulation was intended to limit eligibility for motions to reopen to individuals whose LPR status had been terminated by means of administratively final orders. The BIA concluded that this provision did not change the longstanding principle "that an alien was not 'lawfully' admitted for permanent resident status if, at the time such status was accorded, he or she was not entitled to it."

The BIA remanded the case to the IJ to determine whether Kolomatangi is eligible for a waiver under INA sec. 237(a)(1)(H) based on the fact that he has a U.S. citizen child, or for non-LPR cancellation of removal.

*In re Kolomatangi*, 23 I. & N. Dec. 548, Int. Dec. 3486 (BIA Jan. 8, 2003).

**INS IMPLEMENTS JUDGMENT IN *PROYECTO SAN PABLO*, ALLOWING NEW LEGALIZATION ADJUDICATIONS FOR CLASS MEMBERS** –

The Immigration and Naturalization Service has published a notice in the Federal Register to inform class members in *Proyecto San Pablo v. INS*, No. Civ 89-456-TUC-WDB (D.Ariz.), of the terms of the final court order in the case. That litigation challenged the INS's implementation of the amnesty provisions of the Immigration Reform and Control Act of 1986, specifically the agency's refusal to consider applications from individuals who had been deported. The notice explains the process by which class members may obtain information about their files, file motions to reopen their legalization cases, and obtain work authorization.

The notice defines class members as certain individuals who filed legalization applications under section 245A of the Immigration and Nationality Act between May 5, 1987, and May 4, 1988. The application must have been filed with a legalization office in the former Northern or Western regions of the INS (that is, in Alaska, Arizona, California, Colorado, Hawaii, Idaho, Illinois, In-

diana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nevada, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin, or Wyoming). And the application must have been denied or the applicant's temporary residence terminated because at some time during the period beginning before Jan. 1, 1982, and ending on the date of filing the legalization application he or she departed the United States under an order of deportation.

The notice explains that class members may obtain copies of their INS files by filing a Freedom of Information Act (FOIA) request (either Form G-639 or a letter, a sample of which is included as an attachment to the Federal Register notice) with the Nebraska Service Center of the INS. For immigration court records, a FOIA request must be filed with the Executive Office for Immigration Review at the following address: Office of the General Counsel, Executive Office for Immigration Review, FOIA/PA Requests, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041. Information from these files is likely to be critical in renewing a legalization application, particularly in showing the bases for the legalization denial and the prior deportation.

A class member may obtain a new legalization adjudication by filing a motion to reopen with the INS. The motion to reopen must be filed within one year of the date on which the class member is personally served with the Federal Register notice. The INS will send the notice by certified mail, return receipt requested, to the last known address of those individuals whom the INS has identified as class members. In addition, when a class member applies for employment authorization, the INS will check the individual's file to see if it contains written confirmation of the class member's receipt of the notice. If it does not, the agency will send the notice by certified mail to the address listed on the Form I-765 employment authorization application form. In addition, the INS may personally deliver a copy of the notice to class members when they come into contact with the agency. The one-year period in which motions to reopen must be filed begins only when the notice has been personally served by one of the above-described methods.

The notice explains that class members should include copies of any documents that they received from the INS and EOIR in response to FOIA requests with their motions to reopen. They also can apply for a waiver (by using Form I-690 and paying the fee, currently \$35) of most grounds of inadmissibility, which is available to legalization applicants, and they can apply for any other waiver that they want to have adjudicated. They can also submit a brief and any other evidence in support of their applications, as well as a statement, either that they are ready to have a new decision entered in the legalization case or that they are still awaiting the results of a FOIA request. The notice explains that a motion to reopen must be submitted within the one-year deadline even if the class member has not yet received a response to a FOIA request; in such cases, the class member should include with the motion a statement that he or she is still awaiting this response. Then the INS will not rule on the motion to reopen until the class member has had an opportunity to obtain and review FOIA documents. Such class members must submit a brief and any documents they want considered within six months of receiving responses to both FOIA requests (to the INS and the

EOIR).

The notice explains that class members may apply for employment authorization by submitting Form I-765 (Application for Employment Authorization) without a fee. They should write the word "Proyecto" in box 16 of the application form. The form should be mailed to the Nebraska Service Center, Attn: Proyecto Unit, P.O. Box 87687, Lincoln, NE 68501-7687.

The notice also explains that under the court order class members are entitled to a stay of deportation and to release from custody without bond for as long as they remain class members. Filing either a motion to reopen or an application for employment authorization will serve to notify the INS that an individual is entitled to these benefits, until such time as the INS makes a final decision in the case.

68 Fed. Reg. 4,518-22 (Jan. 29, 2003).

**INS REDUCES FEES FOR IMMIGRATION APPLICATIONS** – The Immigration and Nationalization Service has temporarily reduced the filing fees for a number of applications for immigration benefits. These lowered fees result from amendments made by the Homeland Security Act to section 286(m) of the Immigration and Nationality Act. Under former INA sec. 286(m), the INS was authorized to collect surcharges so that it could recover the costs of providing services for which fees are charged, as well as for those associated with processing other benefits, such as asylum and refugee services, for which no fees are assessed. The Homeland Security Act eliminated the language in sec. 286(m) that authorized the surcharges, and, accordingly, the INS decreased the fees for applications.

The decreases took effect on Jan. 24, 2003, the effective date of the Homeland Security Act. The reduction is likely temporary, and as this issue of IMMIGRANTS' RIGHTS UPDATE went to print, Congress reached an agreement on an appropriations bill that would restore authorization for the surcharges.

In 1988 Congress authorized the INS to establish the Immigration Examinations Fee Account (IEFA) in the U.S. Treasury. All revenue from fees collected from processing applications was deposited in the IEFA. Subsequently, Congress authorized the assessment of surcharges, setting the fees at a level sufficient to fund the processing of asylum and refugee applications as well as other immigration benefit applications processed at no charge to applicants. For example, prior to the fee reductions, the fee for a naturalization application had been \$260. Out of that fee, \$39.77 went to cover the cost of processing asylum and refugee applications, while \$31.87 was used to cover the cost of processing applications for benefits that were granted fee waivers. With the elimination of the surcharges, the INS was required to reduce application fees by an average of \$50 (or 25 percent). However, without the surcharges and without an appropriation for asylum and other related services for which no fees are collected, the INS has no funds with which to pay for the costs of providing asylum application processing and other services free of charge.

At least for the moment, the INS has sufficient funds to continue processing asylum and refugee applications. According to INS spokesman William Strassberger, the agency has approximately \$125 million remaining in the IEFA. However, it will be

necessary to replenish the funds so the agency can continue to process applications for asylum, refugee, and other benefits.

The table below highlights some of the reductions in immigration benefit fees.

Until the fees are finalized, Strassberger noted, immigrants who inadvertently pay the higher fees will receive refunds and those who pay the lower fees will not be expected to pay for the difference if the rates go back up.

68 Fed. Reg. 3,798 (Jan. 24, 2003).

FORM NO.	DESCRIPTION	NEW FEE	FORMER FEE
I-130	Petition for Alien Relative	\$96	\$130
I-485	Application to Register Permanent Residence or to Adjust Status	\$186	\$255
I-601	Application for Waiver of Grounds of Excludability	\$142	\$195
I-765	Application for Employment Authorization	\$88	\$120
I-817	Application for Family Unity Benefits	\$102	\$140
N-400	Application for Naturalization	\$188	\$260

## Litigation

**DISTRICT COURT ENJOINS REMOVALS TO SOMALIA**—The U.S. District Court in Seattle, Washington, has certified a nationwide class and issued a permanent injunction prohibiting the Immigration and Naturalization Service from conducting removals to Somalia. The ruling follows the court's Dec. 2002 order that temporarily restrained the INS from conducting such removals (see "District Court Enjoins Removals to Somalia," IMMIGRANTS' RIGHTS UPDATE, Dec. 23, 2002, p. 6). Following the entry of the temporary restraining order, the court had granted a preliminary injunction. At the request of both parties, the court has now declared the injunction permanent.

The petitioners in this case are Somali nationals subject to final orders of removal. They argued that they cannot be removed to Somalia because there is no government in that country to accept their removal and offer them protection.

The injunction is based on Immigration and Nationality Act sec. 241(b), which governs the determination of the country or countries to which respondents may be deported. The INS acknowledged that in nearly every case the statute requires that a government accept a person before the person can be removed to that country. However, the INS contended that acceptance is not required when the removal is made to a country where the individual was born. The agency also argued that where there is no government to reject a person, "acceptance" has occurred.

The court found that since 1997, the INS has removed 196 Somali nationals to Somalia, using charter aircraft to carry out the removals. However, the court also found that INS agents do not accompany the detainees to Somalia. Moreover, the INS was "unable to inform the Court what happens to Somalis who are removed, or even to confirm that the Somalis handed over to the

charter aviation company are in fact transported to Somalia."

The court determined that the plain language of the statute requires that in every case a country must be willing to accept a person before that person can actually be removed to that country. The court found this interpretation also supported by the case law interpreting similar language found in the statutory predecessor to section 241(b), former INA sec. 243(a) (1995), and by the legislative history of that provision. The court also found that interpreting the statute in this manner avoids violating inter-

national law and that the INS did not dispute that removing Somalis to Somalia "will result in human rights abuses in violation of international law."

In issuing the injunction, the court found that there is a substantial possibility that the petitioners would suffer irreparable harm were they removed to Somalia. The court found that the evidence submitted by the INS fully supported this conclusion: "The INS has shown that Somalia is a country in chaos, engaged in clan warfare with rival groups clashing over turf and control, with no government and no diplomatic relations with the United States.

There is no official entity that might provide even the most basic administrative protections upon [the petitioners'] arrival."

Both parties agreed that, because the issuance of a preliminary injunction requires that the legal issues in this case be resolved, the court should make the injunction permanent. Accordingly, the court entered a permanent injunction.

In certifying a nationwide class, the court concluded that such certification is particularly appropriate in this case, because the issue of the proper interpretation of the statute applies nationwide. The court defined the class to exclude individuals who have pending habeas petitions or appeals that raise the issue of whether their removal to Somalia would be unlawful under INA sec. 241(b).

Finally, the court granted the habeas petitions of three of the individual petitioners and ordered their release from detention. In so doing, it found that their continued detention in the face of no significant likelihood of removal in the reasonably foreseeable future would violate the INA, pursuant to the Supreme Court's interpretation of the statute in *Zadvydas v. Davis*, 533 U.S. 678 (2001). The court declined to rule on the *Zadvydas* claim of another individual petitioner, because he has a habeas petition pending before another judge. The government has filed a notice of appeal of the case to the Ninth Circuit.

*Ali Ali v. Ashcroft*, No. C02-2304P (W.D.Wash. Jan. 17, 2003).

## DISTRICT COURT CERTIFIES NATIONWIDE CLASS IN CHALLENGE TO INS DELAY IN ADJUDICATING ASYLEE ADJUSTMENT APPLICATIONS

—A federal district court in Minnesota has certified a nationwide class in a lawsuit alleging delays and mismanagement on the part of the Immigration and Naturalization Service in the processing and adjudication of applications for adjustment to lawful permanent resident status.

Section 209(b) of the Immigration and Nationality Act authorizes the INS to issue 10,000 immigrant visas per year to asylees. However, according to the class certification decision, the plaintiffs allege that the INS has failed to issue approximately 21,281 asylee immigrant visas that should have been allocated to waiting plaintiffs and class members. They also contend that the INS has violated the regulations by not issuing asylee visas to applicants in the order of their priority dates. The plaintiffs contend that, in part because of mismanagement, there is currently a backlog of more than 96,000 asylee adjustment applicants. The lawsuit also challenges the INS's requirement that asylee adjustment applicants pay a fee to renew their employment authorization documents (EADs) every year, since employment authorization is inherent in asylee status. Other costs resulting from the long delays in asylee adjustment, such as the costs of multiple fingerprinting and medical examinations, are also being challenged.

The court certified a nationwide class of all asylees in the United States who have applied for LPR status and whose applications remain pending. The plaintiffs are represented by the American Immigration Law Foundation, the Massachusetts Law Reform Institute, and the law firm of Dorsey & Whitney, LLP.

*Ngwanya v. Ashcroft*, No. 02-CV-502 RHK/JMM (D.Minn., Jan. 14, 2003).

**9TH CIRCUIT AFFIRMS INVOLUNTARY SERVITUDE CONVICTION** – In an important case with implications for trafficking victims, the Ninth Circuit Court of Appeals upheld an involuntary servitude conviction against a Thai restaurant operator who recruited Thai nationals to work at her restaurant. Although the case arises in the criminal context, the ruling is helpful to future applications of the Trafficking Victims Protection Act of 2000 (TVPA), because it sheds light on the definition of “involuntary servitude.” In order to be eligible for protection under the TVPA, an individual must show that he or she was a victim of severe trafficking. The definition of the term “severe trafficking” includes situations in which individuals are trafficked through the use of force, fraud, or coercion, in order to be subjected to involuntary servitude.

The case involved Supawan Veerapol, a Thai woman who recruited Nobi Saeieo, a non-English-speaking Thai villager with a second grade education. Veerapol offered Saeieo transportation to and employment in the United States and later made travel arrangements and set up accommodations for her in her home.

While in the U.S., Saeieo was forced by Veerapol to work excessive hours not only at the restaurant but also at Veerapol's home. Saeieo was required to wash Veerapol's car, cook, provide manicures and pedicures, clean the restaurant owner's nine-year-old boy after he went to the bathroom, and serve Veerapol's houseguests on one knee.

During the time Saeieo worked for her, Veerapol maintained Saeieo in virtual isolation. She forbade her from reading Thai newspapers, going to stores, speaking with houseguests or restaurant customers, or using the telephone or mail. She also maintained control over her through verbal abuse, threats of legal action, and physical force. Veerapol refused to allow Saeieo to return home to Thailand and once warned her she would kill her if she left. She also told Saeieo that if she requested help, the police

in the U.S. would arrest her as an illegal alien. Eventually, Saeieo's sister contacted the Thai Foreign Ministry and Saeieo was allowed to return home.

Charges of compelling involuntary servitude were eventually brought against Veerapol, and the district court found her guilty. Veerapol appealed to the Ninth Circuit and challenged the sufficiency of the evidence of involuntary servitude. In affirming the conviction, the court looked to the U.S. Supreme Court's decision in *United States v. Kozminski*, 487 U.S. 931 (1988). The *Kozminski* court held that an involuntary servitude conviction requires a showing that the defendant compelled the victim to work by the use or threat of physical restraint or injury, or coercion through law or the legal process. Once that requirement is met, the jury determines whether the physical or legal coercion or threats could plausibly have compelled the victim to serve. In making this determination, the jury could also consider other evidence of coercion, poor working conditions, or the victim's special vulnerabilities.

The Ninth Circuit underscored the Supreme Court's statement that “threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude.” Accordingly, based on the facts presented, the Ninth Circuit affirmed the district court's ruling. The Ninth Circuit also affirmed the district court's decision to augment Veerapol's sentence under the vulnerable victim enhancement statute, as well as the order of restitution to the victim.

*United States v. Veerapol*, 312 F.3d 1128 (9th Cir. 2002).

## Employment Issues

**MICHIGAN COURT OF APPEALS LIMITS WORKERS' COMPENSATION RECOVERY IN CASES INVOLVING UNDOCUMENTED WORKERS** – The Michigan Court of Appeals has held that undocumented workers are covered by that state's workers' compensation law and are entitled to full medical benefits. However, the court also held that their right to wage loss benefits ends at the time that the employer “discovers” that they lack authorization to work.

The plaintiffs in the consolidated cases, David Sanchez and Alejandro Vazquez, presented the employer, Eagle Alloy, Inc. (a foundry), with false documentation of work authorization at the time they were hired. Sanchez was injured in 1998, when a machine closed on his hand, crushing and burning it between two heated plates. Vazquez was injured in Jan. 1999, when he lifted a heavy piece of metal at work and suffered a left acromioclavicular joint separation. Both workers were fired in the summer of 1999, after the employer received letters from the Social Security Administration (SSA), informing it that the workers' Social Security numbers were invalid.

The Michigan's Workers' Compensation Disability Act states that an employer is not liable for compensation for wage loss “for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.” Based on its reading of the U.S. Supreme Court's decision in

*Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), the Michigan Court of Appeals determined that the workers' "admitted use of fake documents to obtain employment constituted 'commission of a crime' under the [workers' compensation] statute." It further held that when the employer "learned of plaintiffs' employment status and could not legally retain them as employees or find them other work, [the workers] became unable to obtain or perform work 'because of' the commission of a crime." Thus, the court upheld the magistrate's award of wage loss benefits to Sanchez up to "the date on which his employment status was discovered" and to Vazquez until the date "on which his illegal status was confirmed." (For a summary of the *Hoffman* decision, see "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing," IMMIGRANTS' RIGHTS UPDATE, Apr. 12, 2002, p. 10).

The court rejected the employer's argument that undocumented workers are not covered by the statute—and thus not even entitled to medical benefits—because they had entered into an "illegal contract."

This case highlights the importance of limiting employer inquiries into work authorization and of understanding how Social Security "no-match" letters can prompt such inquiries. Employers' "discovery" of employees' lack of work authorization deprives workers of a monetary remedy, as happened in this case. Also, the discovery may well encourage unscrupulous employers to fire undocumented workers after an injury to avoid workers' compensation liability. Further, Eagle Alloy was prompted to inquire into Sanchez's and Vazquez's work authorization because of SSA no-match letters it received. It is important for workers and advocates to understand that the letters do not always give the employer the right to question employees about their work authorization.

Advocates have convinced courts to limit discovery into plaintiffs' immigration status in several post-*Hoffman* employment cases. (For a discussion of some of those cases, see "*Hoffman*: Lower Courts Limit Impact of High Court's Decision Barring Undocumented Worker from Receiving Back Pay," IMMIGRANTS' RIGHTS UPDATE, May 30, 2002, p. 8, and "Courts Continue Rejecting Defendants' Post-*Hoffman* Inquiries Into Plaintiffs' Immigration Status," IRU, Oct. 21, 2002, p. 10.) For an explanation about and advocacy tips concerning SSA no-match letters, see "Information Packet for Immigrant Workers' Advocates," which can be downloaded from the "Immigrants and Employment" section of NILC's Web site at [www.nilc.org/immsemplmnt/index.htm](http://www.nilc.org/immsemplmnt/index.htm).

*Sanchez et al. v. Eagle Alloy, Inc.*, \_\_\_N.W.2d\_\_\_, 2003 Mich. App. LEXIS 25 (Jan. 7, 2003).

## Immigrants & Welfare Update

**USDA ISSUES GUIDANCE ON IMPLEMENTATION OF IMMIGRANT FOOD STAMP RULES** – The U.S. Dept. of Agriculture (USDA) has issued helpful guidance on the immigrant-related requirements in the Food Stamp Program. Released in Jan. 2003, the "Non-Citizen Requirements in the Food Stamp Program" is intended to assist states in implementing the immigrant provisions of the Farm Se-

curity and Rural Investment Act of 2002 ("2002 farm bill"). The Bush administration estimates that, when fully implemented, the 2002 farm bill will restore access to nutrition assistance for 400,000 immigrants, including low-wage working families, children, seniors, and persons with disabilities.

In addition to reviewing the immigrant eligibility criteria, the guidance addresses various factors that prevent eligible families from seeking assistance, such as public charge and confidentiality concerns. The federal agency noted that less than half of the eligible immigrants and only 38 percent of the eligible U.S. citizen children in immigrant households participated in the program (compared with a 59 percent overall participation rate). Finally, the guidance clarifies the "immigrant sponsor deeming" and "sponsor liability" rules for lawful permanent residents (LPRs) whose sponsors signed enforceable affidavits of support (Immigration and Naturalization Service Form I-864). A small but growing number of these immigrants will become eligible for food stamps beginning in April 2003.

The key provisions in the guidance are summarized below:

***New Immigrant Eligibility Groups.*** In addition to the immigrants who are currently eligible for food stamps, the following three groups became eligible as a result of the 2002 Farm Bill:

- *Persons receiving disability assistance*, regardless of their date of entry into the U.S. (effective Oct. 1, 2002). Disability-related assistance includes Supplemental Security Income (SSI), interim assistance pending the processing of an application for SSI, Social Security disability, federal or state disability retirement benefits for a permanent disability, veteran's disability benefits, or railroad retirement disability. It also includes persons receiving disability-related Medicaid, state or federal supplemental assistance, benefits from state-funded Medicaid and SSI replacement programs, and disability-related state general assistance benefits *if the disability determination uses criteria that are as stringent as federal SSI criteria*. The guidance confirmed that general assistance and state medical programs may use a doctor's statement to determine that the immigrant meets the SSI disability criteria.

- *Persons who have been in "qualified" immigrant status in the U.S. for at least five years* (effective Apr. 1, 2003). This provision applies to all qualified immigrants regardless of when they entered the U.S. It effectively eliminates the current seven-year time period for "refugee-like" groups (refugees, persons granted asylum or withholding of deportation/removal, Cuban/Haitian entrants, and Amerasian immigrants), allowing these immigrants to receive assistance indefinitely.

- *Children under 18 years of age*, regardless of their date of entry into the U.S. (effective Oct. 1, 2003). Immigrant sponsor deeming rules will not apply to these children. Children who turn 18 during a certification period can wait until the household's next recertification date to report the change. Agencies must examine whether the 18-year-old remains eligible based on other criteria before decreasing benefits.

***Immigrant Sponsor Deeming.*** Under "immigrant sponsor deeming," most of a sponsor's income and resources are added to the immigrant's in determining eligibility for benefits. As a result, deeming rules often render an immigrant ineligible for benefits as having an income higher than the maximum allowed. However,

there are several important exceptions to these rules.

The Food Stamp Program applies deeming only to immigrants whose sponsors signed "enforceable" affidavits of support (INS Form I-864). Enforceable affidavits are used by

- most family-based immigrants who applied for lawful permanent residence after Dec. 19, 1997; and
- most immigrants applying for lawful permanent residence through an employer after Dec. 19, 1997, if the employer is a relative or if a relative owns more than five percent of the business.

(Note that immigrants with credit for 40 quarters of work history in the U.S. are not required to file an affidavit of support.)

Deeming begins when the immigrant becomes an LPR and continues until the immigrant becomes a U.S. citizen, abandons LPR status, or secures credit for 40 quarters of work history in the U.S.

Deeming does not apply to

- immigrants without sponsors, or those whose sponsors did not sign an enforceable affidavit of support;
- immigrants whose sponsor lives in the same food stamp household;
- ineligible member of the household (If the sponsored immigrant is ineligible for food stamps based on his or her immigration status, the sponsor's income is not deemed to other eligible members of the sponsor's household.);
- immigrants with credit for 40 quarters of work history (including work performed by a spouse during marriage, and by parents before the immigrant turned 18 years of age) (Immigrants cannot get credit for quarters in which the worker or the immigrant received a federal means-tested public benefit—i.e., federal food stamps, Medicaid, SCHIP, SSI or TANF.);
  - children (beginning Oct. 1, 2003);
  - domestic violence survivors (Deeming does not apply for 12 months and can be extended if the abuse is recognized by a court, administrative order, or the INS.); and
  - immigrants who would go hungry or homeless without assistance (the "indigence" exemption). An immigrant is considered indigent if the immigrant's household income, including any in-kind assistance received, is less than 130 percent of the federal poverty level. Indigence determinations are effective for 12 months and are renewable for additional 12-month periods. Agencies making indigence determinations must report the names and addresses of these immigrants and their sponsors to the INS Statistics Division. Although it is highly unlikely that this reporting provision will have any immigration consequences for the immigrant or his or her sponsor, it could deter many immigrants from seeking assistance.

The guidance confirms that immigrants who are exempt from deeming *do not need to provide information about a sponsor's income and resources*. Generally, the immigrant is responsible for obtaining the cooperation of the sponsor, but the state agency must assist the household in obtaining the necessary verification. Pending verification, the state agency cannot delay, deny, reduce, or terminate the individual's eligibility for benefits based on his or her immigration status. The USDA clarified that state agencies are not required to impose deeming rules in state-funded programs.

**Sponsor Liability.** Sponsors who sign the enforceable affidavit

of support (INS Form I-864) may be liable to repay certain means-tested public benefits, including food stamps, used by the sponsored immigrant. However, there are important exceptions to these rules.

The affidavit of support goes into effect when the immigrant becomes an LPR. The affidavit remains in effect until the immigrant secures credit for 40 quarters of work history in the U.S. (including work performed by a spouse during marriage or by parents before the immigrant was 18 years old), abandons lawful permanent residence, becomes a citizen, or until the sponsor or the sponsored immigrant dies. If the immigrant receives benefits during this time, the sponsor may be liable for 10 years after the benefits were last received.

The sponsor is *not* responsible for benefits used before the immigrant became an LPR. The sponsor also is not responsible for benefits used by unsponsored members of the household (e.g., U.S. citizen children) or for benefits used while the sponsor was receiving food stamps.

Although state agencies must "request" reimbursement from sponsors where applicable, they are *not* required to pursue legal action against sponsors. Before requesting reimbursement, state agencies must verify that the immigrant's sponsor is subject to liability (e.g., by determining whether the sponsor signed an enforceable affidavit, whether the immigrant had credit for 40 quarters of work, and whether the sponsor was receiving food stamps while the sponsorship agreement was in effect).

It is important to note that the USDA confirmed that state agencies may not keep any portion of the reimbursement for food stamps recouped from sponsors and that sponsor liability actions are not subject to review for quality control errors.

**Reporting Requirements.** The USDA confirmed that state agencies may comply with the food stamp reporting provision by following the guidance on section 404 of the 1996 welfare law, issued by the Depts. of Health and Human Services and Housing and Urban Development, the Social Security Administration, and the INS (65 Fed. Reg. 58,301, Sept. 28, 2000). The requirement applies only to persons applying for benefits and only when the agency "knows" that the applicant is unlawfully in the U.S. According to the interagency guidance, such knowledge is present only when the finding is made as part of a formal determination subject to administrative review and is supported by a determination of the INS or Executive Office of Immigration Review, such as a final order of deportation. There is no requirement that agencies file reports if there is no such finding.

**Public Charge.** The USDA guidance reiterates the INS policy that the use of food stamps is not weighed against an immigrant in the "public charge" decision, and it references various materials on the INS Web site.

**Verification.** The USDA guidance confirms that food stamp agencies must not delay, deny, reduce, or terminate benefits once the applicant's documents have been submitted to the INS for verification. Applicants who provide documentation that the SSA is investigating a claim that they have 40 quarters of work history in the U.S. should be granted food stamps for up to six months, pending results of the investigation.

In addition, the guidance confirms that food stamp agencies are not required to verify the status of nonapplicant family or

household members and should not deny benefits to other household members if one member has not disclosed his or her immigration status. An applicant who does not wish to provide information about citizenship, immigration status, or Social Security number may withdraw his or her application without affecting the benefits of the other household members. These nonapplicant household members must, however, disclose information about their income. A separate chapter of the guidance describes the state options for counting the income and resources of ineligible household members.

The guidance also reviews procedures for verifying various immigrant eligibility categories and includes a chapter on victims of trafficking and battered immigrants.

The "Non-Citizen Requirements in the Food Stamp Program" can be downloaded from the USDA's Web site at [www.fns.usda.gov/fsp/rules/Legislation/pdfs/Non\\_Citizen\\_Guidance.pdf](http://www.fns.usda.gov/fsp/rules/Legislation/pdfs/Non_Citizen_Guidance.pdf).

#### **WORKFORCE INVESTMENT ACT (WIA) TO BE REAUTHORIZED THIS YEAR**

– The Workforce Investment Act (WIA), which replaced the Job Training Partnership Act (JTPA) in 1998, is scheduled to be reauthorized by Congress by Sept. 30, 2003. The WIA is the major source of federal funding for most workforce development programs, including job training, adult basic education, and English as a second language classes. Unlike the JTPA, the WIA does not have any criteria that require funds to be directed at low-income individuals. Rather, the WIA was conceived as a "one-stop delivery system" where all workers can seek employment, education, and training services at local and regional "one-stop

centers." However, because most one-stop centers have interpreted the WIA as requiring a "work first" emphasis, they have implemented programs that emphasize job placement over providing skills training.

Although WIA's goal is to "improve the quality of the workforce," WIA programs have been ineffective in serving immigrants and persons who are limited English-proficient (LEP). Most job seekers have been prevented from participating in training programs under the WIA because of the "work first" mentality. For immigrants, this inability to receive training is significant. Immigrants who are fluent in oral and written English earn approximately 24 percent more than those who lack fluency, regardless of their vocational qualifications. Even when immigrants are given the opportunity to enroll in training programs, there are not enough of them to meet their training needs. Most training programs, for example, are linguistically inaccessible for LEP participants and/or require an eighth grade English reading level. Extensive research demonstrates that programs that integrate skills training and education with English proficiency are more effective than those providing skills training or education alone.

The reauthorization debate will create an opportunity to improve the program, although Congress is unlikely to make major changes. Rep. Howard "Buck" McKeon (R-CA), chair of the House 21st Century Competitiveness Subcommittee in the Education and the Workforce Committee, is currently seeking public comment on reauthorization. Comments are due by Feb. 28, 2003, and can be submitted on the subcommittee's Web site at <http://edworkforce.house.gov/issues/108th/workforce/wia/wiacomments/index.htm>. For more information or to receive model comments, please contact Tyler Moran at [moran@nilc.org](mailto:moran@nilc.org).



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