



## Immigration Issues

**ATTORNEY GENERAL VACATES *MATTER OF R-A***— Shortly before leaving office, Attorney General Janet Reno vacated the Board of Immigration Appeals' decision in *Matter of R-A*, Int. Dec. 3403 (BIA 1999), a case involving a Guatemalan who had been severely abused by her husband. The woman had applied for asylum on the basis of the abuse. She prevailed before an immigration judge but lost before the BIA when the government appealed. She subsequently filed a petition for review before the Ninth Circuit Court of Appeals, but the appellate court stayed the case pending review by the attorney general.

The AG's Jan. 19, 2001, order remands the case back to the BIA and directs it to stay reconsideration of the decision until after the proposed asylum rules on "particular social group" and gender are published in final form (see "INS Issues Proposed and

Final Asylum Regulations," this page). The AG directs the BIA to reconsider the case in light of the final rule.

**INS ISSUES PROPOSED AND FINAL ASYLUM REGULATIONS**— The Immigration and Naturalization Service recently issued sets of proposed and final regulations relating to asylum. The proposed regulations respond to and provide guidance on issues arising in *Matter of R-A*, Int. Dec. 3404 (BIA 1999), a case concerning a Guatemalan woman who was subjected to domestic violence. Among other things, the rules define "persecution" and "particular social group." The final rules concern asylum procedures and took effect on Jan. 5, 2001.

This summary highlights substantive changes contained in both the proposed and final asylum regulations. Not included in this survey are the numerous enumerations and minor language revisions provided for in the new regulations.

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## PROPOSED ASYLUM REGULATIONS

**Burden of proof regarding past persecution.** The proposed regulations modify the burden of proof standard by increasing the burden on the asylum applicant. Under current rules, applicants who establish that they have been persecuted in their country of origin are presumed to have a well-founded fear of being persecuted if they return there. The Immigration and Naturalization Service can rebut this presumption by showing, through a preponderance of the evidence, that conditions have changed in the country of origin to such a degree that the applicant no longer has a well-founded fear of being persecuted if he or she returns there. However, the proposed regulation makes it easier for the INS to rebut this presumption. The agency may do so by showing, by a preponderance of the evidence, that the applicant's circumstances have undergone a fundamental change or that it would be reasonable to expect that the applicant could relocate within the country of origin and thus avoid persecution. The proposed regulation makes similar changes to the standard for proving eligibility for withholding of removal. Thus, the applicant would not be relieved of the burden of producing testimonial or documentary evidence relating to future persecution.

In addition, the proposed regulations state that if an applicant's fear of future persecution is unrelated to the persecution he or she suffered in the past, the applicant still bears the burden of establishing that his or her fear of future persecution is well-founded.

Finally, if an immigration judge or the Board of Immigration Appeals finds that the applicant has failed to establish past persecution, questions of fundamental changed circumstances and reasonable internal relocation are reserved such that the INS is not required to present evidence to preserve the issues. If the finding is set aside, the INS and the applicant can, on remand, submit evidence and argument on the questions of fundamental changed circumstances and reasonable internal relocation before any ruling is issued. These provisions are also referenced in the final regulations discussed below.

**New definition of "persecution."** Until now, asylum regulations did not define "persecution"; the frequently used definition, "the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive," was derived from case law. The proposed regulation defines persecution differently, as "the infliction of objectively serious harm or suffering that is subjectively experienced as serious harm or suffering by the applicant, regardless of whether the persecutor intends to cause harm." It is unclear whether the inclusion of the qualifier "objectively serious" imposes a higher standard that the applicant must meet.

On the other hand, the proposed regulations embrace the notion developed in *Matter of Kasinga*, 21 Int. Dec. 357 (BIA 1996) (*en banc*) and *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997), both of which held that asylum applicants can establish that they were persecuted without having to show that their persecutor intended to cause them harm. In accordance with those holdings, the proposed rules clearly recognize that such intent need not be established. The rules also codify existing law by adding that the harm or suffering must be inflicted by the government or by a person or group that the government is unable or unwilling to control.

**The nexus requirement.** In order to obtain asylum or withholding of removal, an applicant must establish that the persecution he or she suffered was on account of one of five factors enumerated in the Immigration and Nationality Act: race, religion, national origin, political opinion, or membership in a particular social group. There must be a nexus, or connection, between the persecution suffered and one of the enumerated grounds. The interpretation of this nexus requirement has varied widely among the circuit courts. The Ninth Circuit Court of Appeals, for one, has held that the nexus requirement is satisfied where the applicant can establish one motive for persecution as falling under one of the statutorily enumerated grounds. *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995). The proposed regulations require the applicant to show that one of the enumerated grounds is central to the persecutor's motivation to act against the applicant. This requirement may impose additional hardships on applicants in an area where persecutors' motives are already difficult to demonstrate.

The proposed rules also incorporate the doctrine of imputed political opinion. The doctrine applies if the applicant can show that the persecutor was or is inclined to persecute the applicant because the persecutor perceives him or her to possess a particular political opinion, even if the applicant does not in fact hold such an opinion.

**Membership in a particular social group.** The proposed regulations define "particular social group" and thereby codify *Matter of Acosta*, 19 I. & N. Dec. 234-35. The proposed rule defines a "particular social group" as composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to his or her identity or conscience that he or she should not be required to change it. The regulations also require that the group exist independently of the fact of persecution. That is, the persecutory experience should not be the sole common factor joining such individuals in a group.

The proposed regulations include a confusing section that attempts to describe when past experience defines a particular social group. According to the rule, the experience must have been such that, at the time it occurred, the member could not have changed it. Or, the experience must have been so fundamental to the member's identity or conscience that he or she should not be required to change it. The preamble to the proposed regulations suggests that not all experiences can qualify persons who have had them for protection as a particular social group. It uses the example of gang membership and states that such an experience would not be protected because that type of experience could have been avoided.

The proposed regulations adopt a flexible approach to defining social groups, recognizing that many factors may be relevant to (but not necessarily determinative of) whether a social group exists. The proposed regulations' supplementary information specifically contemplates that this flexibility will support domestic violence victims' ability to establish membership in a social group. The factors listed in the regulations include whether

- members of the group are closely affiliated with each other;
- members are driven by a common motive or interest;
- a voluntary associational relationship exists among the members;

- the group is a recognized segment of the population in the country in question;
- members view themselves as members of the group; and
- the society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.

#### FINAL ASYLUM REGULATIONS

***Certain noncitizens not entitled to proceedings under INA section 240.*** The new regulations provide that if proceedings are referred to them by the INS regional director or district director, IJs have exclusive jurisdiction over persons ordered removed pursuant to section 235(c) (terrorists) or persons applying for or admitted under section 101(a)(15)(S) (criminal witnesses).

***Penalties for filing false information.*** The new regulations provide that persons who knowingly place false information in their applications for asylum or withholding of removal may be subject to criminal penalties under 18 U.S.C. or civil and criminal penalties under the INA's document fraud provisions.

***Applicant allowed to present evidence.*** The INA allows any person, irrespective of status, who is physically present in the U.S. to apply for asylum. This broad rule is subject to exceptions in cases where the person may be removed to another country. When any of these exceptions apply, the new regulations direct asylum officers or IJs to review the application and give the applicant an opportunity to present any relevant evidence bearing on any prohibitions on filing.

***One-year deadline.*** All asylum applicants must present their applications within one year of entering the U.S. According to the final rules, the one-year deadline must be calculated from the date of the person's last arrival in the U.S. When the last day of the period falls on a Saturday, Sunday, or legal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Generally, an application is considered filed on the date it is received by the INS. The rule, however, creates a special exception solely for applications filed with the INS and strictly for purposes of meeting the one-year deadline. Individuals who can show by clear and convincing evidence that they mailed an asylum application to the agency within the one-year timeframe will be considered to have met the requirement. However, asylum applications mailed to the immigration court or the BIA must still be received by the court or BIA within the one-year deadline.

***Changed circumstances.*** Changes in circumstances may constitute exceptions to the one-year filing deadline. The final rule provides that the list of factors currently in the regulations is not exclusive. The new rules also eliminate the term "objective," which had previously defined changed circumstances. This change was made in order to reflect subjective changes that the applicant might have made, such as undergoing a religious conversion. The final rules also eliminate the requirement that changes occur within the U.S.

The newly issued final rules also add to the list of changed circumstances the cessation of the relationship between the principal and a dependent who was a derivative in the application. Finally, the rules require the INS to take into account an applicant's delayed awareness of the change in circumstances.

***Extraordinary circumstances.*** The one-year deadline for filing

an asylum application may be exceeded if certain extraordinary circumstances obtain. The new rules modify in a number of ways how extraordinary circumstances may be taken into account in determining whether an application filed after the deadline will be accepted. The rules clarify that (1) the applicant has the burden of proving the existence of extraordinary circumstances; (2) the circumstances cannot have been intentionally caused by the person; (3) the circumstances must have been directly related to the late filing; and (4) the delay in filing the application must be reasonable in light of those circumstances. In addition, the new rules remove the requirement that any serious physical or mental disability preventing the person from timely filing be "of significant duration."

The final rule also allows persons who have obtained parole or who are in legal immigrant or nonimmigrant status to apply for asylum within a reasonable period of time after the expiration of their status. In addition, the rules add to the list of exceptional circumstances situations where the applicant's legal representative or immediate family member has suffered serious illness, is incapacitated, or has died.

Finally, the rules have been changed to authorize, in certain circumstances, the filing of an application directly with the director of the Asylum Office and the director of the Asylum Program rather than with the INS service center. The rules also permit direct filings with the Asylum Office in situations where an applicant loses derivative status and must therefore file as a principal.

***Special duties toward noncitizens in custody of the INS.*** The final rules add new language providing that while the INS is not required to provide asylum applications to detained persons with pending credible fear or reasonable fear determinations, it may provide detainees with appropriate forms if they request them.

***Past persecution.*** As noted above, both the proposed and final rules modify the burden of proof, even in situations where a person has established persecution in the past.

***Well-founded fear of persecution.*** The new rules also include relocation provisions that affect a person's ability to establish a well-founded fear of persecution. According to the rules, if the applicant can avoid persecution by relocating to another part of his or her country and such relocation can be considered reasonable given the circumstances, the applicant cannot establish a well-founded fear of persecution.

For purposes of relocation, the rules direct adjudicators to consider

- whether the applicant would face other serious harm in the place of suggested relocation;
- any ongoing civil strife within the country;
- administrative economic or judicial infrastructure;
- geographic limitations; and
- social and cultural constraints such as age, gender, health, and social and familial ties.

In cases in which the applicant has not established past persecution, the applicant bears the burden of establishing that it would not be reasonable for him or her to relocate unless the persecution is by a government or is government-sponsored.

In cases where the persecutor is the government and the applicant has established past persecution, it shall be presumed that internal relocation would not be reasonable. In order to rebut this presumption, the INS must establish by a preponder-



ance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

**Approval, denial, referrals, and dismissals.** 8 C.F.R. section 208.4 has been substantially revised and reorganized and now outlines procedures for granting and denying asylum. It allows asylum officers to deny asylum if persons have been in a lawful status such as temporary protected status, or have been paroled. It also adds procedures for persons who have been paroled into the U.S. A new provision has been added to section 208.19 providing that a letter communicating denial or referral of the application must state the basis for the denial or referral.

**Termination of asylum and withholding.** The final rules also alter the preexisting section on change in country conditions. The new rule provides that a person is no longer entitled to withholding of deportation or removal when, owing to a fundamental change in circumstances relating to the original claim, the person's life or freedom no longer would be threatened on account of one of the enumerated grounds.

**Credible fear determinations.** Credible fear determinations are subject to a few modifications under the new rules. A new section has been added allowing dependent(s) to file for asylum along with the principal.

If the person establishes a credible fear of persecution subject to one of the mandatory bars to asylum, the rules direct the INS to place the person in proceedings under INA section 240 for full consideration of the person's claim. If the person is a stowaway, he or she must be placed in proceedings under 8 C.F.R. section 208.2(c)(3).

Two new provisions allow a person's failure or refusal to request a review to be treated as a request for review and allow the INS to reconsider a determination even after the judge has affirmed the decision.

65 Fed. Reg. 76,588-98 (Dec. 7, 2000) (proposed asylum regulations); 65 Fed. Reg. 76,121-38 (Dec. 6, 2000) (final asylum regulations).

#### **EOIR ISSUES FINAL RULE TO ALLOW SOME LPRs WITH PRE-AEDPA CONVICTIONS TO APPLY FOR 212(c) WAIVERS**

The Executive Office for Immigration Review has issued a final rule that allows some lawful permanent residents whose deportation proceedings were initiated prior to the Apr. 24, 1996, enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to apply for waivers under section 212(c) of the Immigration and Nationality Act. Under the rule, the EOIR will not apply the restrictions set forth in AEDPA section 440(d) (which prohibits granting 212(c) relief to individuals who are deportable because of certain criminal convictions) to individuals in deportation proceedings initiated prior to the AEDPA's enactment. Individuals with final orders who are eligible to apply for 212(c) relief under this rule and who do not currently have a motion to reopen to apply for 212(c) relief pending before the Board of Immigration Appeals or an immigration judge must file a special motion to reopen by July 23, 2001.

The final rule in most respects is the same as the proposed rule that former Attorney General Janet Reno issued in August 2000 (see "AG Proposes to Allow Some LPRs with Pre-AEDPA Convictions to Apply for 212(c) Waivers," IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 2000, p. 1). In issuing the proposed rule, the

AG acknowledged that most of the U.S. circuit courts of appeal have found that section 440(d) does not apply to immigrants in pre-AEDPA proceedings. In the interest of "the uniform administration of the immigration laws," she decided "to acquiesce on a nationwide basis" to the appellate rulings that section 440(d) does not apply to individuals whose deportation proceedings were initiated before Apr. 24, 1996. At the same time that the proposed rule was issued, the INS placed a moratorium on deporting individuals who could benefit from the rule.

Section 212(c) of the INA provides relief from deportation to LPRs who have lawfully resided in the United States for at least seven years. However, section 440(d) of the AEDPA makes this relief unavailable to individuals who are deportable because of a controlled substance offense, a firearms offense, an "aggravated felony," or two crimes of moral turpitude (if each of the crimes of moral turpitude meets a specified standard). In *Matter of Soriano*, 21 I. & N. Dec. 516 (Att'y. Gen. 1997), the AG ruled that the restrictions contained in section 440(d) apply to all applicants for 212(c) relief, regardless of when they applied for it or were placed in deportation proceedings. However, as noted above, all but one of the U.S. circuit courts of appeal that have reviewed this decision found that it impermissibly applies AEDPA retroactively. See *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Sandoval v. INS*, 166 F.3d 225 (3d Cir. 1999); *Tasios v. Reno*, 204 F.3d 544 (4th Cir. 2000); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magaña-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999); and *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999). Only the Seventh Circuit has upheld the attorney general's *Soriano* decision. See *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), *cert. denied*, 120 S.Ct. 1157 (2000).

The final rule allows LPRs in deportation proceedings to apply for 212(c) relief if they are eligible for it but for AEDPA section 440(d) and their Orders to Show Cause were filed with the immigration court before Apr. 24, 1996. LPRs with final deportation orders also may apply for 212(c) relief by filing a special motion to reopen, if they meet the following requirements:

- their OSCs were filed with the immigration court before Apr. 24, 1996;
- they are subject to a final order of deportation;
- they would now be eligible for 212(c) relief if their proceedings were reopened (i.e., they must have lived in the U.S. for seven years as either a lawful permanent resident or lawful temporary resident before they became subject to an administratively final order of deportation) and section 212(c) as it existed on Apr. 23, 1996, applied to them; and
- either (a) they applied for and were denied 212(c) relief by the BIA on the basis of the attorney general's *Soriano* decision, or its rationale, "and not any other basis"; or (b) they applied for and were denied 212(c) relief by the immigration court and did not appeal the denial, or withdrew an appeal, and would have been eligible for 212(c) relief at the time they received final deportation orders but for the *Soriano* decision or its rationale; or (c) they did not apply for 212(c) relief but would have been eligible for it at the time their deportation orders became final, but for the *Soriano* decision or its rationale.

The relief offered by the new rule is limited in several ways. It

is not available to individuals who have already been deported or who are outside the U.S., nor to individuals who were deported and subsequently returned to the U.S. illegally. The final rule narrowly interprets the commencement of deportation proceedings. Rather than considering proceedings commenced with the issuance or service of an OSC, the rule requires that the OSC have been filed with the immigration court before Apr. 24, 1996. And under the rule, individuals who were denied 212(c) relief by the BIA on any basis other than the *Soriano* decision or the rationale underlying it will not be eligible for relief. Thus, individuals whose 212(c) applications were denied on the merits would not be able to apply for 212(c) relief under the final rule. The rule also does not allow LPRs who were placed in deportation proceedings after the AEDPA's enactment to apply for relief, even though several circuits have ruled that in some circumstances the AEDPA restrictions cannot be applied to immigrants whose proceedings were initiated *after* the statute's enactment. See *Mattis v. Reno*, 212 F.3d 31 (1st Cir. 2000); *Tasios v. Reno*, 204 F.3d 544 (4th Cir. 2000); and *Magana-Pizano v. Reno*, 200 F.3d 603 (9th Cir. 1999).

In order to take advantage of this relief, eligible individuals with final orders must file a special motion to reopen by July 23, 2001. In cases where individuals already have a motion to reopen to apply for 212(c) relief pending before the BIA or the immigration court, that application will be deemed to be a special motion to reopen under the rule. The special motion to reopen is not subject to the normal time and number restrictions on motions to reopen, but only one special motion may be filed. There is no fee for this special motion to reopen. However, where reopening is granted and the individual has not previously applied for 212(c) relief, he or she will have to pay the fee (currently \$170) for filing the application, Form I-191, or request a fee waiver. Reopening under the final rule only allows the applicant to apply for 212(c) relief; the EOIR will not consider applications for any other relief unless the individual independently qualifies for reopening on another basis.

To submit a special motion to reopen under the final rule, eligible individuals must apply either to the immigration court or the BIA, whichever forum last held jurisdiction over the case. The front page of the motion and the envelope containing it should include the notation "Special 212(c) Motion." If the individual previously applied for 212(c) relief, he or she may either submit a copy of that application or a new application and supporting documents. Individuals who have not previously applied for 212(c) relief must submit new applications and supporting documents. Since filing a motion to reopen does not in itself stay the execution of a deportation order, individuals who need stays must also file Form I-246 (Application for Stay of Removal) and follow the procedures of the regulations to request a stay.

The new rule has an effective date of Jan. 22, 2001. This date is not affected by President George W. Bush's executive order delaying the effective date of certain recently issued regulations.

66 Fed. Reg. 6,436-46 (Jan. 22, 2001);

66 Fed. Reg. 8,149 (Jan. 29, 2001) (correction to Jan. 22 notice).

**SALVADORANS WARNED NOT TO LEAVE U.S. WITHOUT PERMISSION; REMOVAL OF SALVADORAN NATIONALS TEMPORARILY SUSPENDED** – The Immigration and Naturalization Service has issued a state-

ment warning Salvadorans applying for permanent residence or who are in the United States under temporary protected status not to travel to their home country without securing official permission. In a related development, the INS announced that it has temporarily suspended the removal of Salvadorans currently in the U.S. Both moves are related to the devastating earthquake that rocked the Central American nation in January 2001.

According to the INS, individuals who are applying for adjustment to permanent residence under the Nicaraguan Adjustment and Central American Relief Act or are in the U.S. under the temporary protected status (TPS) program should be most careful. Salvadorans who return to El Salvador without the appropriate documents risk being refused permission to reenter the U.S. upon their return. Those who are applying for permanent residence risk having their applications automatically invalidated.

The INS issued the warning to dispel the misconception among Salvadorans in the U.S. that advance parole would be automatically granted in connection with the earthquake. Advance parole is advance permission to return to the U.S. following a departure, and applications for it are reviewed on a case-by-case basis. As the INS warned, agency approval is far from guaranteed. Reportedly, unscrupulous individuals have been charging some Salvadorans fees to process advance parole applications and guaranteeing their issuance.

In addition, the INS decided to suspend temporarily the removal of Salvadoran nationals, approximately 1,100 of whom are in INS custody awaiting repatriation. The temporary suspension will remain in effect until the U.S. determines that El Salvador is able to accept its nationals. The Dept. of Justice is also reviewing a request made by the government of El Salvador to consider granting TPS status to Salvadorans currently in the U.S.

**INS PUBLISHES RULES FOR DETAINEES WHO HAVE BEEN ORDERED REMOVED BUT CANNOT BE REPATRIATED** – The Immigration and Naturalization Service has issued new regulations that lay out uniform procedures for determining if or when detainees may be released from INS custody if they have been ordered removed from the United States but cannot be sent back to their countries of origin because their countries will not accept them.

Section 241(a)(1) of the Immigration and Nationality Act requires the INS to remove individuals from the U.S. within 90 days of the date they are issued final orders of removal. However, several countries, such as Vietnam, Cambodia, Laos, and Cuba, have no repatriation agreements with the U.S. Thus, until a recent ruling handed down by the Ninth Circuit Court of Appeals, individuals from such countries who had final orders of removal simply languished in prisons or INS detention centers.

Courts of appeal have reached conflicting rulings on the indefinite detention of such persons. The Fifth and the Tenth Circuits have upheld the U.S. attorney general's authority to keep such persons in detention after the 90-day "removal period." See *Duy Dac Ho v. Joseph Greene*, 204 F.3d 1045 (10th Cir. 2000), *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 121 S.Ct. 297 (2000). In contrast, the Ninth Circuit has held that the detention of such persons may not be extended more than a "reasonable" time beyond the 90-day period provided for by the statute. See *Ma v. Reno*, 208 F.3d 815, 822 (9th Cir. 2000), *cert. granted*, 121 S.Ct. 297 (2000). The U.S. Supreme Court recently

granted certiorari in the *Zadvydas* and *Ma* cases.

The INS's new regulations regarding release determinations for persons detained indefinitely, which were issued on Dec. 21, 2000, supercede the guidance provided in an Aug. 6, 1999, memo issued by Michael Pearson, INS executive associate commissioner, Office of Field Operations. In addition to providing a regulatory framework for making release determinations, the new rules differ from the Pearson memo in at least two significant ways: first, the rules eliminate review by the Board of Immigration Appeals; and second, whereas the Pearson memo provided that detainees' custody status would be reviewed every 6 months, the new rules extend the period between reviews to 12 months.

**Who is subject to the new rules.** The new rules apply to individuals who are ordered removed, and whose countries are unwilling to accept them, and who are:

- inadmissible under INA section 212, including individuals who are excludable and have committed one or more aggravated felonies;
- nonimmigrants who failed to maintain their nonimmigrant status or violated the conditions of their entry;
- individuals who have committed certain crimes under INA section 237(a)(2), including persons with offenses considered crimes of moral turpitude or individuals considered security risks under INA section 237(a)(4); and
- individuals who are granted withholding or deferral of removal who are subject to detention, individuals whose deferral of removal is being terminated under 8 C.F.R. section 208.17(d), and individuals who have applied for but not yet been granted motions to reopen their cases.

Detained Mariel Cubans who are awaiting exclusion or removal hearings are not subject to these rules. Determinations concerning their release are governed by procedures in 8 C.F.R. section 212.12.

**The custody review process.** The initial determination of whether a detainee will be kept in custody beyond the statutory 90-day removal period is made by the INS district director who has jurisdiction over the detainee. Before the removal period expires, the district director must review the detainee's records, including any written information submitted by or on behalf of the detainee. (Any such information must be submitted in English.) The district director must notify the detainee in writing whether the detainee either is to be released from custody or will remain in custody pending removal or further review of his or her custody status. The detainee must be notified 30 days in advance of the district director's review of the detainee's records so that he or she can submit any written information that may support his or her release. The detainee may be represented by a person of his or her own choosing, so long as the representative does not present a security risk. If the detainee or representative requests additional time to gather information, the detainee waives the requirement that the review occur prior to the expiration of the removal period.

The district director's evaluation of custody status may also include an in-person or telephonic interview with the detainee. After considering all relevant information, the district director may decide whether or not to release the detainee.

If the district director denies release, he or she may retain responsibility for making determinations on the detainee's con-

tinued custody for up to three months after the 90-day removal period expires. If the INS does not remove the detainee from the U.S. within the three-month period following the expiration of the 90-day removal period, the district director may release the detainee or refer the case to the Headquarters Post-Order Detention Unit (HQPDU). The INS must provide the detainee with approximately 30 days' notice of this further review, which must be conducted by the expiration of the removal period or as soon as practicable.

The HQPDU is a newly designated unit with review authority over custody decisions. The INS executive associate commissioner appoints the director of the HQPDU, and this director designates a panel or panels to make recommendations to the executive associate commissioner. A review panel consists of two persons selected from the professional staff of the INS. All recommendations by the two-member review panel must be unanimous. If the two members split their votes on any particular detainee's case, the panel must adjourn until a third member is added. This third member must be either the HQPDU director or the director's designee. The three-member review panel's recommendation must be by majority vote.

For each detainee whose case is being reviewed, the HQPDU director or a review panel must review the detainee's records. Upon completing this review, the HQPDU director or the panel may issue a written recommendation that the detainee be released, which must include the reasons for the recommendation.

If the HQPDU director does not accept a panel's recommendation to release the detainee or if the detainee is not recommended for release, a review panel must personally interview the detainee. At this interview, the detainee may be represented or assisted by a person of his or her choosing. Upon completing the interview and its deliberations, the review panel must issue a written recommendation on whether to release the detainee or to keep him or her in custody, and must include a brief statement of factors deemed material to the recommendation. The executive associate commissioner is to then consider the recommendation, along with any written information, and then decide whether or not to release the detainee.

If the end result of this process is a decision not to release the detainee, a subsequent review must commence within one year of the executive associate commissioner's decision. Every three months, the detainee may submit a written request to the HQPDU asking to be released. In making the request, the detainee must try to show that there has been a material change in his or her circumstances since the previous annual review.

**Factors for consideration of release.** Persons detained indefinitely because their countries of origin will not accept them back have the burden of showing that their release will not pose a danger to the community or to the safety of other persons or property or a significant risk that they will flee before they can be removed from the U.S.

In considering whether to release a detainee, the INS district director or executive associate commissioner must consider the following factors:

1. The nature and number of disciplinary infractions the detainee has committed or incident reports the detainee received when incarcerated or while in the custody of the INS.
2. The detainee's criminal conduct and criminal convictions,



including the nature and severity of the detainee's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism and other criminal history.

3. Any available psychiatric and psychological reports pertaining to the detainee's mental health.

4. Evidence of rehabilitation, including institutional progress relating to participation in work, educational, and vocational programs.

5. Favorable factors, including ties to the U.S. (e.g., whether the detainee has close relatives who legally reside in the U.S.).

6. "Prior immigration violations and history."

7. The likelihood that the detainee is a significant flight risk or may abscond to avoid removal from the U.S., including any history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, etc.

8. Any other information that is probative of whether the detainee is likely to (a) adjust to life in a community, (b) engage in future acts of violence, (c) engage in future criminal activity, (d) pose a danger to the safety of him or herself or to other persons or property, or (e) violate the conditions of his or her release from immigration custody pending removal from the U.S.

**Criteria for release.** Before making any recommendation or decision to release a detainee, a majority of the review panel members, or, in the case of a record review, the director of the HQPDU, must conclude that:

1. travel documents for the detainee are not available or, in the opinion of the INS, immediate removal, while proper, is otherwise not practicable or not in the public interest;

2. the detainee is presently a nonviolent person;

3. the detainee is likely to remain nonviolent if released;

4. the detainee is not likely to pose a threat to the community following release;

5. the detainee is not likely to violate the conditions of release; and

6. the detainee does not pose a significant flight risk if released.

At any point during the process, if the INS establishes that travel documents can be obtained for the detainee, the detainee will not be released unless immediate removal is not practicable or in the public interest. Moreover, the INS will not conduct a custody review once the agency notifies the detainee that it is ready to execute an order of removal. Finally, release will be denied if the detainee fails or refuses to cooperate in the process of obtaining a travel document.

**Conditions of release.** The INS district director or executive associate commissioner may impose conditions on a detainee's release from custody. One condition they may impose is that the detainee must reside with a close relative, such as a parent, spouse, child, or sibling, who is a U.S. citizen or lawful permanent resident and who agrees to sponsor the detainee. Or the detainee's release may be conditioned on the detainee's placement or participation in an approved halfway house or other community mental health project. If either of these conditions are imposed, the detainee may not be released until sponsorship, housing, or other placement has been found.

The INS may also issue work authorization to the detainee, at

the agency's discretion.

**Transitional individuals.** Detainees whose last review was subject to the executive associate commissioner's memoranda of either Feb. 3, 1999, Apr. 30, 1999, Aug. 6, 1999, or Dec. 22, 1999, and whose written records have already been reviewed must receive a further review from the HQPDU within six months of the previous review. If the detainee's last review included an interview, the HQPDU will conduct a further review one year from the last review. These reviews will be conducted pursuant to the HQPDU procedures outlined above.

Cases involving the indefinite detention of immigrants with final removal orders that are pending before the Board of Immigration Appeals on Dec. 21, 2000, must be completed by the BIA. In cases where the BIA affirms the INS district director's decision to maintain the detainee in custody, the next custody review must be conducted one year after the BIA's decision.

**Revocation.** Any formerly detained individual who has been released under an order of supervision or any other condition of release who violates the condition may be returned to custody as well as be subjected to a \$1000 fine or imprisonment. The individual must be notified of why his or her release has been revoked. Such individuals must be afforded an initial informal interview promptly after their return to INS custody so that they may respond to the reasons for revocation stated in the notification.

The INS has the authority to revoke the release of any person who has a final order of removal and return the person to its custody. Any release may be revoked in the exercise of discretion when the revoking officials deem that:

- the purposes of release have been served;
- the released individual has violated any condition of release;
- revoking the release is appropriate to enforce a removal order;

or

- the conduct of the individual, or any other circumstance, indicates that release is no longer appropriate.

65 Fed. Reg. 80,281-98 (Dec. 21, 2000).

#### **CLINIC PROJECT TO MONITOR CUSTODY REVIEWS FOR INDEFINITELY DETAINED IMMIGRANTS**

– Catholic Legal Immigration Network, Inc. (CLINIC) is beginning a project to monitor Immigration and Naturalization Service custody reviews of persons with final orders of removal. The purpose of the project is to monitor the INS's compliance with its newly published regulations regarding the detention of persons who have been ordered removed but who cannot be returned to their countries of origin (see "INS Publishes Rules for Detainees Who Have Been Ordered Removed but Cannot Be Repatriated," p. 5). The results of the monitoring will be used in advocacy efforts on behalf of indefinitely detained persons.

Contact Laurie Joyce at 415-394-0785 or CLINICLAJ@aol.com if you have any comments, complaints, suggestions, etc., regarding custody reviews. CLINIC is particularly interested in receiving copies of INS custody decisions (including decisions to release persons), and especially the following information about particular cases: (1) the date of the final order of removal; (2) any Notice of Custody Review; (3) the INS custody decision; and (4) subsequent decisions from INS headquarters.

Send written materials to: Laurie Joyce, CLINIC, 564 Market St., Suite 416, San Francisco, CA 94104.

**INS CLARIFIES PAROLE AUTHORITY** – The Immigration and Naturalization Service has published an interim rule clarifying the authority of agency officials to grant parole. Under its parole authority, the INS may, for humanitarian or public interest reasons, allow individuals into the United States and release them from custody. The parole regulations previously in effect referred only to the district director and the chief patrol agent, thus suggesting that they were the only officials with authority to issue parole decisions. The interim rule adds a new paragraph in 8 C.F.R. section 212.5 specifically stating that the scope of authority to grant parole flows from the commissioner through her designees, and that the deputy commissioner, the executive associate commissioner for field operations, regional directors, and other designees also have the power to grant parole.

65 Fed. Reg. 82,254–56 (Dec. 28, 2000).

**STATE DEPT. CHANGES IMMIGRANT VISA PROCESSING PROCEDURES TO REQUIRE DESIGNATION OF AGENTS**

– In two unclassified telegrams recently issued to all diplomatic and consular posts, the U.S. Dept. of State has announced that beneficiaries of immigrant visa petitions must designate an agent to handle communications from the National Visa Center (NVC). The agency also announced the release of the new Form DS-3032, Choice of Address and Agent for Immigrant Visa Applicants, that visa applicants must use to make such designations. Beginning Jan. 1, 2001, all principal beneficiaries of immigrant visa petitions with cases on file at the NVC were sent Form DS-3032 at the same time the I-864 Affidavit of Support form was sent to the petitioners. Failure to return the DS-3032 within a year of its mailing will result in the termination of the case.

In completing the new form, visa applicants must provide the current address and name of the person who will act as their agent (the State Dept. recommends that agents have U.S. addresses). Agents can be the relative or employer who filed the petition, an attorney, a friend, or a nongovernmental or community-based organization. Applicants may also choose not to designate an agent, in which case the DS-3032 should instruct the NVC to send mailings directly to the applicant. There is no fee that must be submitted with the DS-3032.

The agent designated on the DS-3032 will receive mailings from the NVC on the applicant's behalf and can assist in completing paperwork or paying fees. However, the agent will not have the authority to sign documents on the applicant's behalf, including the DS-3032.

The State Dept. introduced this new procedure to help streamline its visa processing operations. The form will soon be available for download on the agency's web site at [www.state.gov](http://www.state.gov).

IV Reform: First Steps on January 1, Cable 00-State-238959 (Dec. 19, 2000); A New Form – DS3032, Choice of Address and Agent Immigrant Visa Applicants, Cable 01-State-4847 (Jan. 10, 2001).

**BUREAU OF CONSULAR AFFAIRS LAUNCHES AFFIDAVIT OF SUPPORT WEB SITE**

– The U.S. Dept. of State's Bureau of Consular affairs has launched a web site that provides guidance on completing Form I-864, the affidavit of support. The site offers pages that explain the process of completing the affidavit as well as the form itself. The site also contains an interactive page on which users

can complete the form while on line and print out copies containing the information they have input. At this time, the site is not equipped to accept on-line submission of information.

Web visitors can find the site at <http://travel.state.gov/aos.html>.

**BIA: MOTION TO REMAND AMOUNTS TO SECOND MOTION TO REOPEN, THEREFORE BARRED BY TIME AND NUMERICAL LIMITS**

– In rejecting a respondent's motion to remand to apply for adjustment of status, the Board of Immigration Appeals also ruled against her appeal of an immigration judge's denial of her motion to reopen. The IJ had rejected the motion to reopen as untimely because it was filed more than 90 days after the entry of a final administrative order against her. In light of that denial, the BIA held, the respondent remains subject to the final administrative order. Therefore, her motion to remand amounted to another motion to reopen that violated regulatory numerical and time restrictions on such motions.

On Sept. 26, 1996, the IJ granted the respondent voluntary departure and entered an alternate order of deportation against her. The respondent subsequently married a U.S. citizen and filed, on Mar. 11, 1997, a motion to reopen to apply for adjustment. The IJ ruled against the motion, holding that it failed to meet the requirements set forth in 8 C.F.R. sections 3.2(c)(2) and 3.23(b)(1) that such motions be filed within 90 days of the entry of a final administrative order. In addition to an appeal of that denial, the respondent filed with the BIA the motion to remand.

Ruling that the motion to remand amounted to a second motion to reopen, the BIA rejected it as also violating regulations governing motions to reopen. In addition to the 90-day limit, the regulations restrict respondents to only one motion to reopen. Because neither the appeal nor the motion to remand addressed the untimeliness of the initial motion to reopen, the BIA dismissed both and affirmed the deportation order against the respondent.

*In re Oparah*, Int. Dec. No. 3441 (BIA Dec. 15, 2000).

## Litigation

**9TH CIRCUIT RULES CERTAIN LPRS CAN APPLY FOR 212(c) RELIEF IN REMOVAL PROCEEDINGS; SUPREME COURT TO DECIDE ISSUE ON REVIEW OF 2D CIRCUIT CASE**

– The Ninth Circuit Court of Appeals has ruled that certain lawful permanent residents can apply for waivers under former section 212(c) of the Immigration and Nationality Act, even if they are in removal (rather than deportation) proceedings. The decision comes on appeal from a district court's denial of a habeas corpus petition. Under the ruling, LPRs may apply for 212(c) relief only if they would be eligible for 212(c) waivers but for a conviction entered prior to Apr. 24, 1996, (the date of enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)) that resulted from a guilty plea, and only if they can show that the guilty plea was entered in reliance on the availability of 212(c) relief. In a related development, the U.S. Supreme Court has decided to review a Second Circuit case that found 212(c) relief to be available for LPRs with pre-AEDPA guilty pleas who are in removal proceedings.

The petitioner in the Ninth Circuit case, a Mr. Richards-Diaz, is an LPR admitted to the U.S. in 1975. In February 1996, he pled



guilty to illegal transportation of a controlled substance. In June 1997, the INS initiated removal proceedings against Richards-Diaz, charging him with being removable for having been convicted of an aggravated felony. The immigration judge at his hearing found him removable and not eligible for any relief, and on appeal the Board of Immigration Appeals upheld this decision.

Richards-Diaz then filed a petition for habeas corpus with the district court in order to obtain a review of the BIA decision. The district court found that it had jurisdiction over the petition but denied it on the merits. The court concluded that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which repealed section 212(c) and substituted cancellation of removal as a form of relief for long-term LPRs, was not impermissibly retroactive. Richards-Diaz appealed that decision.

On appeal, the court first affirmed the district court's jurisdiction over the petition, citing *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000) (holding that the IIRIRA permanent rules for judicial review did not repeal habeas jurisdiction to review removal orders) (see "9th Circuit: Jurisdiction to Review Removal Orders Based on Criminal Convictions Lies with Habeas, Not Petition for Review," IMMIGRANTS' RIGHTS UPDATE, June 6, 2000, p. 7).

Turning to the merits, the court rejected the argument that IIRIRA's repeal of section 212(c) in general is impermissibly retroactive. The court concluded that Congress clearly intended IIRIRA's repeal of 212(c) to apply to all immigrants except those in transitional deportation or exclusion proceedings.

However, the Ninth Circuit also recognized the same limited exception that the court previously made for individuals in deportation proceedings initiated after the Apr. 24, 1996, effective date of the AEDPA. In *Magana-Pizano v. INS*, 200 F.3d 603, 613 (9th Cir. 1999), the court allowed that such individuals can apply for 212(c) waivers despite the AEDPA's restrictions if they can make "a specific factual showing that a plea was entered in reliance on the availability of a discretionary waiver under section 212(c)." Quoting this exception, the court concluded that LPRs in removal proceedings also can apply for 212(c) if they can make this showing. Because the district court did not address this issue, the court remanded the case for an evidentiary hearing to determine whether Richards-Diaz qualifies for this exception.

The 9th Circuit decision differs from the decision of the Second Circuit in *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), *cert. granted*, 531 U.S. \_\_ (Jan. 12, 2001). In *St. Cyr*, the court found that the AEDPA restrictions on 212(c) relief, and the IIRIRA repeal of section 212(c), do not apply to individuals who plead guilty or *nolo contendere* prior to the enactment of AEDPA. The court did not require a showing of individual reliance. This issue will now be resolved by the U.S. Supreme Court, which decided on Jan. 12, 2001, to review *St. Cyr*.

*Richards-Diaz v. INS*, 233 F.3d 1160 (9th Cir. 2000).

**9TH CIRCUIT RULES ON REINSTATEMENT OF REMOVAL** – The Ninth Circuit Court of Appeals has vacated reinstatement of removal orders that the Immigration and Naturalization Service had issued against five persons under a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Under the provision, the INS may reinstate prior orders of re-

moval against individuals who reenter the United States after being ordered removed.

In the case before the Ninth Circuit, the petitions of the five individuals were consolidated under that of one petitioner, a Mr. Castro-Cortez. In its decision granting the petitions for review and vacating the reinstatement orders, the court discussed issues of jurisdiction, retroactivity, and due process but ruled only on jurisdiction and retroactivity. While questioning whether the procedures developed by the INS to implement reinstatement comport with the Due Process Clause of the Fifth Amendment, the court declined to rule on this issue.

Under the immigration statute's reinstatement of removal provision, as amended by the IIRIRA in 1996, there is no relief available to individuals whose orders of removal are reinstated. Although the statute itself makes no mention of procedures that should be followed in enforcing the reinstatement of removal provision, the regulations that implement the statute allow the INS to reinstate prior deportation orders without affording hearings to those against whom orders are issued, nor are such persons allowed any opportunity to contest the orders. In addition, the INS applies the statute retroactively, without regard to when an individual's prior deportation occurred.

The experience of Castro-Cortez illustrates how the INS has enforced the reinstatement of removal provision. He is a 42-year-old Mexican national who has resided in the United States almost continuously since 1975. In 1982 he married a U.S. citizen, with whom he has raised two children. On Feb. 9, 1976, he received an Order to Show Cause charging him with being deportable for having entered the U.S. without inspection. According to Castro-Cortez, he asked to see a judge but was told that the judge was sick. Castro-Cortez says that INS officials told him that if he signed a paper, he could voluntarily depart the U.S. On February 12, he departed the U.S. He says that he never saw a judge nor received any advisal stating that he was required to remain outside the U.S. for a particular length of time. He reentered the U.S. about two months later.

The INS, on the other hand, contends that Castro-Cortez was validly deported. However, there is no written record that a deportation hearing was held for Castro-Cortez, nor is there any evidence that he ever appeared before an immigration judge. Regulations in place at that time required IJs to enter summary decisions even in the cases of respondents who conceded deportability.

Following his deportation and reentry, Castro-Cortez attempted to legalize his status. In 1986 he applied for amnesty under the Special Agricultural Worker (SAW) Program. In 1995, he left the U.S. to visit a sick relative in Mexico. When he returned, an INS official admitted him when he presented his SAW card.

In 1996 after learning that Castro-Cortez's application for amnesty had been denied, his wife filed an immediate relative visa petition on his behalf. It was approved on May 15, 1997. On that day, Castro-Cortez filed an application for adjustment of status.

In 1998, when Castro-Cortez and his counsel appeared at the INS office for a routine adjustment interview, the INS arrested Castro-Cortez and informed him that due to the reinstatement provision, his 1976 deportation order was being reinstated. The INS informed his counsel that the INS intended to deport Castro-Cortez to Mexico that same day. His counsel intervened and

obtained a stay of removal from the Ninth Circuit.

**Jurisdiction.** Like *Castro-Cortez's* case, two of the other cases that were consolidated with his had gone to the Ninth Circuit by direct appeal. The government concedes that under section 242(a)(1) of the Immigration and Nationality Act, which grants courts of appeal authority to review removal orders, the court has jurisdiction to review reinstatement of removal cases. Nevertheless, the government contends that the court lacks jurisdiction over these consolidated cases because the petitioners failed to exhaust the administrative remedies that were available to them. The government argues that at the time the petitioners were issued the reinstatement of removal orders, they were given a form asking them to check a box whereby they could indicate whether or not they wished to make a statement. Since some of the petitioners either indicated they did not want to make a statement or did not check the box, the government argued that they had failed to exhaust administrative remedies.

The court held that the government's argument failed for two reasons. First, according to the court, the opportunity to make a statement does not, under any standard, qualify as an actual administrative remedy. Allowing individuals the opportunity to make a statement provides them neither any advance notice regarding the case against them, nor any opportunity either to review the INS's case or to produce documents that may refute the INS's case, nor any opportunity to consult with or be represented by counsel, the court noted. Moreover, the court held that even if providing an opportunity to make a statement did qualify as a remedy, it is not one that must be exhausted before an appeal can be heard by the appellate court. The INS is not required to consider the individual's statement and thus reconsider whether to reinstate removal. The court therefore held that since the statement is not a remedy as of right, it is not a remedy that must be exhausted before judicial review is authorized.

The plaintiffs in two of the cases that were consolidated with *Castro-Cortez's* case had filed their petitions for review after the district court denied their petitions for habeas corpus. In these cases, the Ninth Circuit employed a jurisdiction-preserving provision that allows the court to transfer cases to itself and consider the petitions as though they had never been filed in the district court. The transfer statute authorizes such an action if (1) the court would have been able to exercise jurisdiction on the date that a case was filed in the district court, and (2) the district court lacked jurisdiction over the case, and (3) the transfer is in the interest of justice.

**Retroactivity.** The Ninth Circuit agreed with the petitioners that the reinstatement of removal provision should not apply to individuals such as themselves who reentered before the IIRIRA's effective date. In doing so, the court analyzed *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). There the Supreme Court reaffirmed the principle that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." According to *Landgraf*, in considering whether the provision of a statute may be applied retroactively, a court must first determine whether Congress has expressly prescribed the statute's proper reach. If it has not, a court must determine whether the statute acts retroactively by assessing whether it "takes away or impairs vested rights, . . . creates a new obligation, . . . imposes a new duty, . . .

[or] attaches a new disability" with respect to transactions that have already taken place. If so, then absent a plain statement to the contrary, courts should presume that Congress did not intend that the statute be retroactively applied. Following *Landgraf*, the U.S. Supreme Court issued its decision in *Lindh v. Murphy*, 521 U.S. 320, 323 (1997), which clarified that the first inquiry that must be made under *Landgraf* should be to determine congressional intent using the rules of statutory construction.

Applying the principles of *Landgraf* and *Lindh*, the Ninth Circuit held that Congress clearly intended that the statute should not be applied retroactively to individuals whose reentry occurred prior to its enactment. The court provided three reasons for concluding that Congress intended that the statute should not be applied retroactively.

First, the court reviewed the language of the prior statute—INA section 242(f)—and noted that it contained a retroactivity clause expressly applying the statute to deportations "whether before or after the date of enactment of this Act." When Congress enacted the IIRIRA, it eliminated the retroactivity language completely. The court concluded that Congress's decision to remove the retroactivity language from the statute provides strong support for the conclusion that Congress did not intend that the revised provision be applied to reentries occurring before the date of the statute's enactment.

Second, citing a number of examples, including IIRIRA's expanded definition of "aggravated felony," the court noted that Congress explicitly directed certain provisions to be applied to pre-enactment conduct. Thus, the court determined that, by implication, Congress did not intend to apply the reinstatement section to individuals who reentered the U.S. before the IIRIRA's effective date.

Finally, the court noted Congress's silence with respect to the statute's temporal scope and held that when Congress enacts legislation, it must be deemed to have done so with *Landgraf's* default rule in mind.

*Castro-Cortez v. INS*, \_\_F3d\_\_, No. 99-70267 (Jan. 23, 2001).

#### **9TH CIRCUIT AFFIRMS PRELIMINARY INJUNCTION IN CLASS ACTION CASE FOR SUSPENSION APPLICANTS**

—The Ninth Circuit Court of Appeals has issued a supplemental decision affirming the federal district court's preliminary injunction in *Barahona-Gomez v. Reno*, a class action lawsuit challenging the actions of Executive Office for Immigration Review officials purporting to implement the 4,000-person cap on suspension/adjustment grants imposed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The court originally issued a decision affirming the injunction in February 1999 (see "9th Circuit Affirms Preliminary Injunction in Class Action Suspension Case," IMMIGRANTS' RIGHTS UPDATE, Apr. 30, 1999, p. 7). However, after the Supreme Court decided *Reno v. American-Arab Anti-discrimination Committee*, 525 U.S. 471 (1999) (AADC), the court requested further briefing addressing the district court's jurisdiction in light of AADC. The supplemental decision affirms the court's jurisdiction and remands the case to the district court for further proceedings.

This litigation challenges directives that were issued by Chairman Paul W. Schmidt of the Board of Immigration Appeals and Chief Immigration Judge Michael J. Creppy on Feb. 13, 1997. These

directives instructed the BIA and the immigration courts not to grant further suspension applications pending additional guidance. The directives were based on the concern of these officials that, under their interpretation of section 309(c)(7) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the EOIR had nearly reached the 4,000-person cap for the fiscal year that began on Oct. 1, 1997. The directives had the most severe impact on applicants served with an Order to Show Cause (OSC) before accumulating seven years' continuous physical presence in the United States. For these individuals, the directives imposed more than a mere delay in the resolution of their cases. They faced the loss of their eligibility for suspension, since under the BIA's interpretation of IIRIRA section 309(c)(5), they would no longer be eligible once the "stop-time" rule took effect on Apr. 1, 1997. (For a further discussion of this issue, see "9th Circuit Decides Stop-Time Rule Applies to Suspension Cases, Bars Accumulating Time after Issuance of OSC," this page).

Soon after, the plaintiffs in *Barahona* filed suit in the U.S. District Court for the Northern District of California, seeking injunctive relief against the postponement of their cases. On Mar. 28, 1997, the district court issued a preliminary injunction and provisional class certification for individuals who may have been ordered deported after being denied suspension based on IIRIRA section 309(c)(5). Six months later, the lower court modified the injunction to require the government to notify class members when their suspension applications are denied based on the new rule for calculating accumulated continuous physical presence. The government appealed both rulings, and the Ninth Circuit consolidated the appeals.

In its first decision, the Ninth Circuit upheld the district court's jurisdiction and the issuance of the preliminary injunction. The court reviewed the traditional criteria for granting preliminary injunctive relief and determined that the plaintiffs met the requirement that moving parties demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of the hardships tips sharply in its favor. While the court declined to comment on their ultimate resolution, it identified five legitimate questions raised by the plaintiffs that warranted the injunction's issuance. Such questions included (1) whether the Creppy and Schmidt directives violated the Administrative Procedures Act; (2) whether the directives violated the due process requirement articulated in *U.S. ex. rel. Accardi v. Shaughnessy* (i.e., that the BIA must exercise its own judgment when considering appeals); (3) whether the directives were issued within the regulatory authority granted to the BIA chair and chief immigration judge; (4) whether the language of the statute, which links suspensions of deportation with adjustments of status, does not actually impose a restriction on the number of deportation suspensions the attorney general may grant; and (5) whether the directives had the effect of applying the 4,000 annual limitation prior to the section's Apr. 1, 1997, effective date. The appeals court also agreed with the lower court's finding that the balance of hardships weighed heavily in the plaintiffs' favor. *Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999) (*Barahona I*).

After issuing the decision in *Barahona I*, the court requested further briefing from the parties concerning the district court's jurisdiction. On Jan. 10, 2001, the court issued a supplemental

opinion affirming the district court's jurisdiction. The court found that the Supreme Court's decision in *AADC* lends further support to the Ninth Circuit's finding of jurisdiction in *Barahona I*. *AADC* concerned the scope of INA section 242(g), which limits the authority of courts to review claims arising from a "decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders" except as authorized by section 242. The Ninth Circuit noted that the Supreme Court in *AADC* "repeatedly characterized this statutory provision as 'narrow.'" Moreover, the Supreme Court explicitly rejected the contention that section 242(g) applies to any claims arising from deportation proceedings apart from the "three discrete events along the road to deportation" stated in the statute—the decision to commence proceedings, adjudicate cases, or execute removal orders. *AADC*, 525 U.S. at 482. And as an example of decisions that are not barred from review under section 242(g), the Court mentioned a decision to reschedule a deportation hearing.

The Ninth Circuit concluded that the reference in section 242(g) to claims arising from decisions to "adjudicate cases" encompasses only challenges to determinations not to decide cases, in the exercise of discretion. Accordingly, the court concluded that section 242(g) does not bar jurisdiction over this case. The court also rejected the argument that section 242(f) bars the injunction issued in this case. Section 242(f) limits injunctive relief in cases challenging specified provisions of the INA. However, as the court found, this provision does not apply to deportation proceedings.

Having affirmed the district court's jurisdiction, the court remanded the case to the district court for further proceedings, including determining the impact of the Nicaraguan Adjustment and Central American Relief Act (NACARA) on the class. In its first decision, the court had identified questions concerning the composition of the *Barahona* class raised by the NACARA's enactment and advised the district court to examine them further. The appellate court had noted that the NACARA, whose passage was prompted in part by concerns raised in the underlying litigation, amended IIRIRA section 309(c)(5) to provide special rules governing applications for suspension of deportation and cancellation of removal by certain qualifying individuals. Because of the high likelihood that such persons may also be members of the certified class, the Ninth Circuit advised the lower court to reexamine the composition of the class, the propriety of creating subclasses, and whether certain named plaintiffs should continue in that role.

*Barahona-Gomez, et al. v. Reno, et al.*, \_\_\_ F.3d \_\_\_, No. 97-15952 (9th Cir. Jan. 10, 2001).

#### **9TH CIRCUIT DECIDES "STOP-TIME" RULE APPLIES TO SUSPENSION CASES, BARS ACCUMULATING TIME AFTER ISSUANCE OF OSC**

— The Ninth Circuit Court of Appeals has ruled that in showing they were continually physically present in the United States for a period of at least seven years, applicants for suspension of deportation cannot count time after they were served with an Order to Show Cause (OSC). The court also concluded that once an individual has been served with an OSC, he or she cannot again accumulate seven years of continuous physical presence in order to qualify for suspension of deportation. The decision comes on review of the Board of Immigration Appeals' denial of suspen-



sion to an ethnic Indian family from Fiji.

The petitioners in this case, the Ram family, came to the U.S. as nonimmigrants in 1987. In 1988 they overstayed their visas, and the INS served them with OSCs to initiate deportation proceedings. They sought asylum and withholding of deportation but were denied, and they filed a petition for review with the Ninth Circuit. In 1994, while that case was pending, they moved to reopen their deportation case in order to apply for suspension of deportation. In 1995 the Ninth Circuit denied the petition for review. The BIA denied the motion to reopen, and the petitioners filed a petition for review on that decision. In 1997 the Ninth Circuit reversed the denial of the motion to reopen and remanded the case to the BIA for further review of the hardship claims at issue in the case.

On remand, the BIA summarily denied the motion to reopen on the grounds that the "stop-time" rule precluded the petitioners from establishing seven years' continuous physical presence. The petitioners filed a petition for review of that decision, resulting in this decision.

On appeal, the court determined that section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended by the Nicaraguan Adjustment and Central American Relief Act (NACARA), causes the stop-time rule to apply to the calculation of the period of continuous physical presence for purposes of suspension eligibility. While finding the statute somewhat ambiguous, the court concluded that the INS's interpretation was more reasonable and was supported by the legislative history of NACARA. The court also noted that six other circuits—the Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh—have reached the same conclusion.

The court rejected the petitioners' contention that application of the stop-time rule to them violated due process as an unfairly retroactive enactment. The court also rejected the argument that the statute violates equal protection.

Finally, again as a matter of statutory interpretation, the court rejected the argument that after an OSC has been served, an immigrant can accumulate seven years' continuous physical presence for purposes of suspension eligibility.

*Ram v. INS*, \_\_ F.3d \_\_, No. 99-70918 (9th Cir. Feb. 8, 2001).

**9TH CIRCUIT REMANDS CASE DUE TO IJ'S REFUSAL TO ISSUE SUBPOENA**—The Ninth Circuit Court of Appeals has remanded an asylum case to the Board of Immigration Appeals with instructions that the BIA issue a subpoena for information the asylum applicants seek to obtain from the Immigration and Naturalization Service. The applicants, a mother and daughter, had asked the immigration judge to subpoena the "country information" the INS asylum officer would have consulted had they appeared for an asylum interview, but the IJ had declined to do so.

The referral document whereby the INS Asylum Office referred Rupinder Kaur and her daughter's application to the immigration court, after finding their asylum claims not credible, contained a boilerplate notice stating that if the Kaur family had appeared for their interview, the asylum officer would have consulted available resource materials on human rights-related conditions in their country. Upon receiving the notice, the Kaur family filed the subpoena request with the IJ, seeking to compel the INS to produce the resource materials cited in the notice.

At the outset of their hearing, the Kaur family renewed their request for a subpoena. When the IJ again denied their request, the Kaur family declined to provide testimony on the ground that they could not proceed in the absence of essential evidence. The IJ subsequently held that by refusing to testify, the Kaur family were abandoning their asylum and withholding claims. On appeal, the BIA upheld the IJ's rulings, whereupon the Kaur family petitioned for review by the Ninth Circuit Court of Appeals.

The Kaur family based their appeal on two arguments. First, they argued that the INS had violated a regulation by failing to refer to the immigration court the complete record of the proceedings that the asylum officer had conducted in their case. Second, they argued that the IJ erred by denying their request for a subpoena. The Ninth Circuit dismissed the former argument but found merit in the latter.

Under 8 C.F.R. section 287.4(a)(2)(ii)(A), an IJ may issue a subpoena requiring the production of documentary evidence if the party applying for a subpoena explains what he or she expects to prove by the documentary evidence and establishes that the documentary evidence is essential.

Analyzing the regulation in light of the facts in the Kaur family case, the Ninth Circuit found that the missing materials were essential. Noting that credibility is a pivotal factor in asylum cases, the court surmised that the asylum officer's adverse credibility finding was probably based on resource materials to which the Kaur family had no access. Such materials, the court reasoned, would probably be used to impeach the Kaur family's testimony. Since the resource materials could prove dispositive of the IJ's determination regarding the Kaur family's credibility, the court ruled that they had made a sufficient showing that the documents were "essential" within the rubric of the regulation. It therefore remanded the case to the BIA with instructions that the subpoena be granted.

*Kaur v. INS*, \_\_ F.3d \_\_ No. 99-70395 (9th Cir. Jan. 24, 2001).

## Employment Issues

**D.C. CIRCUIT COURT AFFIRMS THE RIGHT OF UNDOCUMENTED WORKERS TO RECEIVE BACK PAY**—In a decision anxiously awaited by advocates for immigrant workers, the D.C. Circuit Court of Appeals has rejected an employer's argument that undocumented workers are not entitled to back pay and has held that back pay can be tolled to the date when the employer obtained "after-acquired" evidence of a worker's undocumented status. (After-acquired evidence is evidence obtained by an employer subsequent to the employer's taking the action against an employee that is being challenged.)

At issue in this case were multiple unfair labor practices committed by Hoffman Plastic Compounds, Inc., against workers who were attempting to organize a union. Among other things, Hoffman discharged known union supporters. After the National Labor Relations Board (NLRB) found Hoffman to be in violation of the workers' rights under the National Labor Relations Act (NLRA) to organize a union, a dispute arose over how much back pay was owed to the illegally fired workers. During a compliance hearing, when one of the fired workers admitted to having used a borrowed birth certificate to complete the employment eligibility verification requirement when he was hired, the administrative

law judge (ALJ) denied him reinstatement and back pay. While the NLRB agreed that it could not order the reinstatement of an undocumented worker, since the Immigration Reform and Control Act of 1986 (IRCA) prohibits employers from knowingly hiring undocumented workers, it disagreed with the ALJ with respect to back pay. Since IRCA also prohibits workers from using false documents, the NLRB followed its well-established rule regarding after-acquired evidence, which dictates that back pay owed to a worker who has been illegally discriminated against, but who has also engaged in wrongful conduct, must be tolled to the date when the employer first discovered the wrongful conduct.

Hoffman challenged that award of back pay, arguing that under both *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and IRCA, undocumented workers do not have a right to back pay because they are not entitled to be present and employed in the United States. A divided panel of the D.C. Circuit Court of Appeals affirmed the NLRB's decision ordering limited back pay. *See* 208 F.3d 229 (D.C. Cir. 2000). Hoffman's petition for an en banc rehearing was subsequently granted, and the panel's opinion was vacated.

The D.C. Circuit, persuaded by the reasoning of the Second and Ninth Circuits on this same issue, held that the Supreme Court in *Sure-Tan* denied back pay only to those undocumented workers who had left the country after signing voluntary departures. Furthermore, it held that back pay was denied only so that workers would not have an incentive to reenter the U.S. unlawfully in order to obtain their back pay award. The D.C. Circuit concluded that under *Sure-Tan* and subsequent case law, undocumented workers are as entitled to back pay as documented workers are so long as they remain in the U.S. and the back pay is tailored to their actual loss. The court also held that IRCA's legislative history makes clear that Congress did not intend to undermine the employment and labor rights of undocumented workers, and it found that the NLRB had properly accommodated the provisions of both the NLRA and IRCA in ordering a limited back pay award in the Hoffman case.

Following the Supreme Court's guidance in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), and *ABF Freight System v. NLRB*, 510 U.S. 317 (1994), in which the Court states that the after-acquired evidence rule should be used to help the NLRB balance its responsibility of remedying and deterring unfair labor practices against an employee's misconduct, the D.C. Circuit found that it was entirely appropriate to award limited back pay to the fired undocumented worker.

Moreover, the court pointed out that Hoffman itself could have mitigated its back pay liability by making a bona fide reinstatement offer before it discovered this worker was undocumented, since the immigration regulations do not require an employer to verify the employment eligibility of an individual reinstated after an unlawful discharge.

*Hoffman Plastics Compounds, Inc. v. NLRB*, \_\_\_F3d\_\_\_,  
No. 98-1570 (D.C. Cir. Jan. 16, 2001).

**AGRICULTURAL WORKERS OBTAIN FIRST VICTORY IN CLASS ACTION SUIT FOR UNPAID WAGES** – In a case of first impression, a U.S. district court in northern California has denied the defendant's motion to dismiss and allowed the worker plaintiffs to continue with their class action lawsuit demanding they be paid wages

they allege are owed to them. The court held that the Migrant and Seasonal Agricultural Worker Protection Act of 1983 (AWPA) incorporates the rights set forth in state wage and hour laws.

The plaintiffs in the case are agricultural workers in Monterey County, California. They allege that their employer has not accurately recorded or compensated them for all the hours they have worked dating back to 1996, including "compulsory travel time" when the defendant employer requires all its workers to report to a particular parking lot to be transported to and from work on buses owned and operated by the employer. The workers also allege that they have not been paid for the time they are required to perform warm-up exercises, and for the time they are required to wait for their foreman to finish his or her administrative duties at the end of the workday before being transported back to the parking lot. The plaintiffs filed their lawsuit pursuant to the AWPA, the California Labor Code, and the California Business and Professional Code. They also filed a breach of contract claim.

The defendant argued that the case should be dismissed from federal court because the AWPA does not require employers to pay workers for "compulsory travel time." In its denial of the motion to dismiss, the court stated that Congress's intent is clear from the AWPA statute itself and that the AWPA requires agricultural employers to pay its employees "the wages owed . . . when due." The court went on to hold that the employer's obligations could come from various sources of law, including state law. It found that the plaintiffs had stated a claim under the AWPA, since California law requires that agricultural workers be paid for compulsory travel time. *See Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000).

In moving to dismiss, the defendant asserted that the applicable statute of limitations period was two years and that therefore the plaintiffs should be barred from pursuing relief for claims dating back to 1996. However, the court stated that the AWPA is a remedial statute that should be construed broadly due to its humanitarian purpose. Given that the AWPA does not contain a statute of limitations and that agricultural and migrant workers move often from state to state, the court held that the proper statute of limitations was three years for all the causes of action based on the state law claims filed by the workers, except for the claim that the defendants breached an oral contract, which is subject to a two-year statute of limitations under state law. Accordingly, the court held that the plaintiffs could proceed with all their claims.

*Medrano, et al. v. D'Arrigo Bros. Co. of California*,  
2000 U.S. Dist. LEXIS 18501 (N.D. Cal. Dec. 19, 2000).

**WORLD'S LARGEST PORK PROCESSING PLANT FOUND IN "EGREGIOUS" VIOLATION OF LABOR LAWS** – An administrative law judge issued a 436-page opinion on Dec. 15, 2000, finding that the Smithfield Packing Company's slaughterhouse in Tar Heel, North Carolina, engaged in "egregious and pervasive" violations of the National Labor Relations Act. The violations arose from two separate union organizing drives conducted throughout the 1990s during which 11 employees were fired by Smithfield for supporting the United Food and Commercial Workers (UFCW). The ALJ also found that the company threatened many other workers and improperly interrogated them about union activities, including attempts to intimidate immigrant workers by claiming the union

would report them to the Immigration and Naturalization Service.

The ALJ ordered reinstatement and back pay for the 11 workers who were wrongfully discharged. Results of the most recent election, which saw workers voting against unionizing by a 63 percent margin, were set aside. Given the level of intimidation, the ALJ also ruled that any future union elections must be held outside of the plant, and possibly outside of the county, since Smithfield Packing is so influential there.

**CALIFORNIA INCREASES ITS MINIMUM WAGE** – As of Jan. 1, 2001, employers in California are required to pay all of their workers at least the minimum wage of \$6.25 per hour. The minimum wage is set to increase again on January 1, 2002, at which time it will be \$6.75.

**MULTILINGUAL VERSIONS OF EIC OUTREACH FLYERS RELEASED** – The Center on Budget and Policy Priorities (CBPP), a policy research institute, has released multilingual versions of community outreach flyers explaining the availability of the earned income credit (EIC). The flyers are part of the CBPP's ongoing campaign to encourage eligible individuals to take advantage of the EIC, a tax credit intended to benefit low-income persons.

The flyers are available in Amharic (Ethiopian), Bosnian, Chinese, French, Haitian-Creole, Hmong, Italian, Khmer (Cambodian), Korean, Laotian, Polish, Portuguese, Russian, Somali, Tagalog, Ukrainian, and Vietnamese. To request copies or to obtain more information on the EIC, interested parties should contact John Wanchek, EIC Outreach Coordinator, CBPP, at 202-408-1080. Information on the EIC can also be found on the Center's web site at [www.cbpp.org](http://www.cbpp.org).

## Immigrants & Welfare Update

**ATTORNEY GENERAL PUBLISHES FINAL LIST OF PROGRAMS NECESSARY FOR PROTECTION OF LIFE OR SAFETY** – The U.S. attorney general has issued an order specifying the final list of community programs that are necessary to protect life or safety. Under the 1996 welfare law, the attorney general was authorized to designate certain programs that are exempt from the law's restrictions on immigrants' eligibility for them. The programs must (1) deliver in-kind services at the community level; (2) not condition the provision, amount, or cost of assistance on the applicant's income or resources; and (3) be necessary to protect life or safety. The programs designated by the attorney general are to remain available to all immigrants regardless of status, unless an independent law renders the applicant ineligible.

The attorney general's final list is identical to the provisional list published on Aug. 30, 1996 (61 Fed Reg. 45,985). It describes various types of programs without attempting to designate specifically each program or service covered by the exemption. Included in the attorney general's order are

- "crisis counseling and intervention programs; services and assistance relating to child protection, adult protective services, violence and abuse prevention, victims of domestic violence or other criminal activity; or treatment of mental illness or substance abuse;
- short-term shelter or housing assistance for the homeless, for

victims of domestic violence, or for runaway, abused, or abandoned children;

- programs, services, or assistance to help individuals during periods of heat, cold, or other adverse weather conditions;
- soup kitchens, community food banks, senior nutrition programs such as meals on wheels, and other such community nutritional services for persons requiring special assistance;
- medical and public health services (including treatment and prevention of diseases and injuries) and mental health, disability, or substance abuse assistance necessary to protect life or safety;
- activities designed to protect the life or safety of workers, children and youths, or community residents; and
- any other programs, services, or assistance necessary for the protection of life or safety."

The order reminds providers that programs not appearing on this list may nevertheless be exempt from immigration status verification requirements. In addition, under the 1996 welfare law, nonprofit charitable organizations are not required to determine, verify, or otherwise require proof of immigration status of applicants for benefits.

A.G. Order No. 2353-2001, Jan. 5, 2001 (published in the Federal Register on January 16 as "Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation," 66 Fed. Reg. 3,613-16 (Jan. 16, 2001)).

### FEDERAL AGENCIES CLARIFY ISSUES REGARDING ACCESS TO SERVICES AND HOUSING FOR IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE

– To address the confusion regarding access to services for immigrant domestic violence survivors, the U.S. Dept. of Health and Human Services (HHS) Office for Civil Rights (OCR) has produced a fact sheet outlining the relevant rules. In a related development, the U.S. Dept. of Housing and Urban Development (HUD) has issued a policy directive clarifying eligibility rules on battered immigrants' access to emergency shelters and transitional housing.

In its fact sheet, HHS reminds providers that all victims of domestic violence, regardless of immigration status, are eligible for battered women's shelters. These programs may not discriminate based on national origin and must document their procedures for assuring confidentiality. The fact sheet lists other programs that are exempt from restrictions on immigrants' eligibility, as well as the civil rights laws that protect participants.

In addition, HHS outlines the eligibility requirements and "sponsor deeming" rules for battered immigrants in the Temporary Assistance for Needy Families (TANF) program, Medicaid, and the State Children's Health Insurance Program (SCHIP). The fact sheet also details the Social Security number requirements for these programs and the procedures applicants must follow for securing a nonwork Social Security number. It describes which persons are eligible to file a self-petition for an immigrant visa under the Violence Against Women Act (VAWA) and provides an update on the public charge rules for these immigrants.

HUD issued its policy directive in response to reports that battered immigrants had been denied access to emergency shelters and transitional housing. Conveyed in a letter to HUD funding recipients dated Jan. 19, 2001, the directive references the attorney general's order on the programs "necessary to protect



life or safety" that are exempt from immigration restriction under the 1996 welfare law (see "Attorney General Publishes Final List of Programs Necessary for Protection of Life or Safety," p. 14). These programs include emergency and short-term shelter for victims of domestic violence, as well as crisis counseling and intervention and other services to prevent violence and abuse. Therefore, the directive states, "HUD-funded programs that provide emergency shelter and transitional housing for up to two (2) years are to make these services equally available to all needy persons," including "not qualified" immigrants.

The policy directive further clarified that "all programs administering HUD grants, which provide emergency shelter, transitional housing, short-term shelter and housing assistance to victims of domestic violence are deemed necessary, under the Order, for the protection of life and safety." Programs that meet the attorney general's criteria are to be made available to all persons regardless of immigration status, unless a law other than the 1996 welfare law mandates verification of immigration status. The HUD letter warns that denying access to these services may result in the imposition of "appropriate sanctions." Also consistent with the attorney general's order, the letter reiterates that nonprofit charitable organizations are not required to verify the immigration status of applicants for federal, state, or local benefits.

The HHS fact sheet can be downloaded from OCR's web site at [www.hhs.gov/ocr/immigratoin/bifsltr.html](http://www.hhs.gov/ocr/immigratoin/bifsltr.html). Providers are also encouraged to contact Deeana Jang at the Office for Civil Rights,

[djang@os.dhhs.gov](mailto:djang@os.dhhs.gov), if they have any questions.

#### **HHS QUESTIONS AND ANSWERS ON TANF ADDRESS IMMIGRANT ISSUES**

– The U.S. Dept. of Health and Human Services (HHS) has posted on its web site a series of questions and answers regarding the Temporary Assistance for Needy Families (TANF) program, including a section on immigrants. In its answers, HHS describes which persons are subject to the federal five-year bar on TANF services. Consistent with earlier guidance issued by the attorney general and the Social Security Administration, HHS confirms that immigrants who physically entered the U.S. prior to Aug. 22, 1996, and who remained in the U.S. continuously since that date are not subject to the five-year bar. This includes immigrants who entered the U.S. without documents.

In its web postings, HHS also clarifies that TANF services that do not meet the definition of "federal public benefit," such as shelters for battered women and homeless persons (services that fall within the attorney general's "life or safety" exemption), shall be made available to all persons regardless of immigration status. HHS explains that applicants for benefits under the TANF program must provide a Social Security number (SSN). However, SSNs are not required for services provided under a separate state program or for TANF services that are exempt from or that fall outside of the definition of "federal public benefit."

The TANF questions and answers can be found on HHS's web site at [www.acf.dhhs.gov/programs/ofa/polquest/index.htm](http://www.acf.dhhs.gov/programs/ofa/polquest/index.htm).

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