NATIONAL IMMIGRATION LAW CENTER
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Immigration Issues

INS COMPLETES VACATING DOCUMENT FRAUD ORDERS UNDER SETTLEMENT IN *WALTERS V. RENO;* TWO-YEAR FILING PERIOD FOR MOTIONS TO REOPEN BEGINS – The Immigration and Naturalization Service has notified plaintiffs' counsel in *Walters v. Reno* that it has completed the process of vacating the final orders that were issued against class members under section 274C of the Immigration and Nationality Act (for details of the settlement, see "Settlement Reached in Civil Document Fraud Litigation," IMMIGRANTS' RIGHTS UPDATE, Dec. 27, 2000, p. 8). The notice was sent on Aug. 21, 2001. The INS has also sent plaintiffs' counsel a list with all the names and A-numbers of class members whose orders have been vacated. Attorneys wishing to verify that a client's order has been vacated can contact:

Linton Joaquin
National Immigration Law Center
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
phone: 213-639-3900; fax: 213-639-3911
email: joaquin@nilc.org

This notice commences a two-year period in which class mem-

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bers who have final deportation orders, but who now are eligible for some form of relief (or are no longer deportable) because their 274C final order has been vacated, can request that the INS join in a motion to reopen. There is also a two-year period for class members who paid a fine pursuant to a 274C final order to request a refund from the INS Debt Management Center. A copy of the *Walters* settlement may be obtained at the NILC web site, www.nilc.org. The settlement agreement contains detail about the information that should be included in the requests for joint motions to reopen and requests for refunds. The address for the INS Debt Management Center is:

U.S. Immigration and Naturalization Service
Eastern Regional Office
188 Harvest Lane
Williston, VT 05495-7554
phone: 802-872-6200

DOJ AND STATE DEPT. ISSUE REGULATIONS IMPLEMENTING VICTIMS OF TRAFFICKING LAW – On July 24, 2001, the State Dept. and Dept. of Justice (DOJ) issued interim regulations implementing section 107(c) of the Trafficking Victims Protection Act of 2000 (TVPA). Congress enacted the TVPA in order to combat trafficking in persons, both in the United States and internationally. The TVPA provides the federal government comprehensive tools of investigation and enforcement, and authorizes assistance and protection—including immigration relief—to individuals who cooperate with the investigation and prosecution of traffickers.

The new regulations, which implement the portions of the TVPA concerning protections and services for trafficking victims, offer guidance to officials of the DOJ and State Dept. as well as other law enforcement agencies that may encounter victims. The regulations provide definitions to key TVPA terms. They also address the development of procedures to protect and provide services to trafficking victims; victim identification; detention; providing victims access to information on protection, safety, medical care, and rights; mechanisms for allowing victims to remain in the U.S.; and training for law enforcement personnel.

Definitions. The following are some of the key definitions provided by the regulations.

"Coercion" means threats of serious harm to or physical restraint against any person. It also encompasses any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person. Coercion also includes the abuse or threatened abuse of law or the legal process.

"Commercial sex act" means any sex act in exchange for which something of value is given to or received by any person.

"Debt bondage" means the status or condition of a debtor stemming from his or her pledge of personal services or those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

"Family members" of trafficking victims include spouses, children, parents, or siblings whom traffickers have targeted or are likely to target and for whom protections from harm may reasonably be provided. The regulations also extend to responsible officials the discretion to include other family members in the family classification.

"Federal victims' rights legislation" includes the Victim and Witness Protection Act of 1982 (VWPA), the Victims of Crime Act of 1984, the Victims Rights and Restitution Act of 1990, the Violent Crime Control and Law Enforcement Act of 1994, the Antiterrorism and Effective Death Penalty Act of 1996, the Victims Rights Clarification Act of 1997, and the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA; note: the TVPA is also known by this name).

"Involuntary servitude" means a condition of servitude induced through any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would be seriously harmed or physically restrained. The term also encompasses the abuse or threatened abuse of the legal process to induce a condition of servitude.

"Severe forms of trafficking in persons" means sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act is under 18 years of age. It also includes the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion, in order to subject that person to involuntary servitude, peonage, debt bondage, or slavery.

"Sex trafficking" means recruiting, harboring, transporting, providing, or obtaining a person in order to have that person participate in a commercial sex act.

Purpose and Scope of Regulations. The regulations apply to all federal law enforcement, immigration, and State Dept. officials to the extent that their duties involve investigating or prosecuting traffickers or that their duties may involve identifying, encountering, or detaining trafficking victims. The regulations' stated intent is to ensure that trafficking victims are fully accorded the rights and protections available to them under both the TVPA and other victims' rights' legislation.

According to the regulations, the DOJ's various components bear most of the responsibilities assigned by TVPA section 107(c). Such responsibilities include identifying trafficking victims as early as possible in the investigation and prosecution process. Appropriate personnel in State Dept. missions are required to be trained in identifying victims. Upon encountering victims, the missions are charged with referring victims to local law enforcement or service providers in the host country, provided local country conditions support those actions. The regulations authorize federal law enforcement officials who encounter trafficking victims to bring them to the attention of the Immigration and Naturalization Service or the Federal Bureau of Investigation, which are the two agencies primarily responsible for enforcing trafficking laws.

Detention of Trafficking Victims. The regulations state that, to the extent legal and practicable, law enforcement officials must, in every case, consider alternatives to formally detaining trafficking victims. However, if detention is required, victims must not be detained in facilities inappropriate to their status as crime victims and officials must make all efforts to house them separately from criminals.

While in federal custody, victims must be provided protections and services in accordance with their status as victims. Under 42 U.S.C. section 10607(a), each agency must designate officials who are responsible for identifying crime victims and providing them with services. Such services include providing victims with information on where they might receive emergency medical and social services, and information on available public or private programs for counseling, treatment, and other support. Victims must also be informed about federal prohibitions on intimidation and harassment.

Medical Care. According to the regulations, victims in federal custody must receive medical care and other health-related assistance. Such care should include free optional testing for HIV and other sexually transmitted diseases in cases involving sexual assault or trafficking in the sex industry. Victims should also receive a counseling session by a medically trained professional on the accuracy of the tests and the risk of transmission of sexually transmitted diseases to the victim. The regulations advise that providing other forms of mental health counseling or social services may also be appropriate.

Protection from Intimidation. Pursuant to the Victim and Witness Protection Act of 1982 (VWPA), federal law enforcement agencies are directed to protect trafficking victims from harm and intimidation. The VWPA sets forth punishment for certain crimes, such as obstruction of justice and witness tampering, and provides for remedies like temporary restraining orders to protect victims from potential harassment or injury from offenders. The regulations suggest that federal officials advise victims on these available remedies. They also direct officials to employ civil procedures to protect victims and witnesses.

If the victim is at risk, responsible officials are, under the TVPA, required to

• use available legal and practical measures to protect the victim and family members from intimidation, harm, and threats of harm; and

• ensure that the names and identifying information of trafficking victims and their family members are not publicly disclosed.

Informing Victims of Their Rights and Available Services. The regulations instruct federal officials to provide victims with information about the following:

• pro bono and low-cost legal services, including immigration services;

• federal and state benefits and services (victims who are minors and adult victims certified by the U.S. Dept. of Health and Human Services are eligible for assistance that is administered or funded by federal agencies to the same extent as refugees; others may be eligible for more limited benefits);

• victims' services organizations, including domestic violence and rape crisis centers;

• protections and remedies available, especially against threats and intimidation;

• individual privacy rights and confidentiality issues;

• victim compensation and assistance programs;

• immigration benefits or programs that may be relevant to victims, including those available under the VTVPA;

• the right to restitution;

• the right to notification of case status; and

• the availability of medical services.

Authority to Permit Continued Presence in the U.S. The regulations provide a means by which law enforcement officials who encounter trafficking victims who may be potential witnesses can request that the INS grant them continued presence in the U.S. All such requests must be submitted to the Office of Field Operations at INS Headquarters. Each federal law enforcement agency must designate a headquarters office to administer submissions and coordinate with the INS on all requests for continued presence.

Upon receiving the request, the INS must determine the victim's immigration status. The INS may use a variety of statutory and administrative mechanisms to allow the individual's continued presence in the U.S. Such mechanisms include granting parole, voluntary departure, stay of a final order, or any other authorized form of continued presence, including applicable nonimmigrant visas. (The TVPA created two new nonimmigrant visas for this purpose, the "T" and "U" visas.) The INS may also grant deferred action based on the trafficking victim's cooperation in an investigation or prosecution of a trafficking case.

Continued presence granted through any of the mechanisms will contain the terms normally associated with the type of presence granted, including: duration of benefit, terms and procedures for receiving an extension, travel limitation, and employment authorization. Individuals granted deferred action based upon their cooperation in an investigation or prosecution of a trafficking case are considered to be present in the U.S. pursuant to a period of stay authorized by the attorney general and are therefore not inadmissible under Immigration and Nationality Act section 212(a)(9)(B)(I) and (C) (bars to admission triggered by unlawful presence and by unlawful presence after previous immigration violations).

In cases where granting an individual continued presence in the U.S. poses a threat to national security or the public, the INS may require the requesting agency to meet special conditions prior to approval. The INS must timely convey such conditions to the requesting agency in writing.

The INS may deny a law enforcement agency's requests when

• the agency fails to provide necessary documentation or to adhere to established INS procedures;

• the agency refuses to agree or comply with conditions instituted by the INS;

• the requesting agency fails to comply with past supervision or reporting requirements established as condition of continued presence;

• the INS determines that granting continued presence would create a significant risk to national security or public safety and the risk cannot be eliminated or minimized by agreed-upon conditions.

In case of a denial, the regulations require that the INS promptly notify the designated office within the requesting agency. The INS is directed to reach an acceptable resolution with the requesting agency. If resolution is not possible, the INS must promptly forward the matter to the deputy attorney general or his designee for resolution.

Training. The regulations require that DOJ and State Dept. personnel be trained in identifying victims of trafficking and in providing for their protection. The training must specifically

include

• procedures and techniques for identifying victims;

• instruction on the rights of crime victims, including confidentiality requirements;

• a description of services available to trafficking victims at all stages of the law enforcement process;

• a description of referral services to be provided to trafficking victims;

• an explanation of benefits and services available to trafficking victims, regardless of their immigration status;

• a description of the particular needs of trafficking victims;

• an explanation of procedures and techniques for dealing with the specialized needs of victims who may face cultural, linguistic, and/or other obstacles that impede their ability to request and obtain services for themselves; and

• an explanation of the obligations of responsible officials under federal law and policies to protect victims.

Each component of the State Dept. and DOJ with program responsibility for victim witness services must provide initial training in the particular needs of victims. Initial training should be conducted as soon as possible and held on a recurring basis to ensure that victims' rights are protected and that they receive all the protections and services accorded them under the TVPA and other federal law.

The new regulations took effect on Aug. 23, 2001, and the comment period will end on Oct. 22, 2001.

66 Fed. Reg. 38,514–22 (July 24, 2001).

INS ISSUES INTERIM RULE ON K VISAS – The Immigration and Naturalization Service has issued an interim rule to implement the expansion of the "K" nonimmigrant visa category that was enacted as part of the Legal Immigration Family Equity Act of 2000 (LIFE Act). Historically, the K visa has allowed fiancé(e)s of U.S. citizens and their children to enter the U.S. and adjust to lawful permanent resident status. The LIFE Act expands the visa to also allow spouses of U.S. citizens and the spouses' children to enter the U.S. and work while awaiting adjustment to LPR status.

The regulations create two new subcategories of the K visa: the K-3 visa for spouses and the K-4 visa for the spouses' children. In order to be eligible for a K-3 visa, an individual must be the spouse of a U.S. citizen and must be the beneficiary of a pending Form I-130 (Petition for Alien Relative) filed by the citizen spouse. To be eligible for a K-4 visa, an individual must be unmarried, under 21 years of age, and the child of a K-3 visaholder.

In order for a spouse to apply for a K-3 visa, the U.S. citizen spouse must complete and send Form I-129F (Petition for Alien Fiancé(e)) to:

U.S. Immigration and Naturalization Service
P.O. Box 7218
Chicago, IL 60680-7218

After the INS approves the petition, the agency will notify the U.S. consulate in the country where the marriage took place. If that country does not have a U.S. consulate, the INS will notify the consular post that has jurisdiction to issue immigrant visas for nationals of that country. If the marriage took place in the U.S., the INS will notify the consulate in the immigrant's country of residence of the approval of the petition. Once the petition has been approved, the immigrant can appear at the consulate to apply for the K-3 visa. He or she must submit a completed Form I-693 (Medical Examination) at that time.

A child applying for a K-4 visa does not need to have a separate Form I-130 or I-129F filed on his or her behalf. The child must submit a completed Form I-693 at the time of the consular appointment. While no I-130 is required for the child, the INS notes in the supplemental information to the rule that "nothing in the law prevents the U.S. citizen stepparent from filing Form I-130 for the child, and such action would be prudent and beneficial to the child." An I-130 would eventually have to be filed before the child could adjust to LPR status in the U.S.

The INS is using the Form I-129F for K-3 and K-4 applicants as a temporary measure, until such time as the agency creates a new form for this petition. The U.S. citizen petitioner should answer the questions on the form assuming that "fiancé" or "fiancée" refers to "spouse." Questions B.18 and B.19 on the newest version of the form (Mar. 29, 2001) should be omitted by marking "N/A." In question 20, the petitioner should identify the appropriate U.S. consulate in the country in which the marriage took place—or, if the marriage took place in the U.S., the immigrant spouse's place of residence. This should also be indicated on the I-130 petition.

Persons appearing at a port of entry with valid K-3 visas will be inspected and, if the INS finds them admissible, admitted to the U.S. for a two-year period. Holders of K-4 visas will be admitted for a two-year period or until the day before the child's twenty-first birthday, if that happens sooner. K-3 and K-4 nonimmigrants are not subject to the enforceable affidavit of support (I-864) requirement of section 213A of the Immigration and Nationality Act. However, according to INS they are subject to this requirement at the time they apply for adjustment or for an immigrant visa.

K-3 and K-4 nonimmigrants may apply for an extension of their stay, which will be extended in two-year increments. They will need to show that they are pursuing the immigration process. Generally, they must have filed form I-485 (Application for Adjustment of Status) or an application for an immigrant visa. Alternately, they may satisfy this requirement by showing that they are still awaiting approval of a pending I-130 petition or showing "good cause" why they have not yet applied for an immigrant visa.

According to the interim rule, K-3 and K-4 nonimmigrants are considered authorized to work incident to their status, but they are required to apply for employment authorization to obtain evidence of their work authorization. To obtain an employment authorization document (EAD), they must submit Form I-765 (Application for Employment Authorization) together with the fee (currently $100) to the same INS post office address where the I-129F is filed.

The interim rule took effect on Aug. 14, 2001. The INS invites public comments to be considered in development of a final rule. Comments must be submitted on or before Oct. 15, 2001.

66 Fed. Reg. 42,587–95 (Aug. 14, 2001).

INS CORRECTS ADDRESS FOR LIFE LEGALIZATION AND FAMILY UNITY APPLICATIONS – The Immigration and Naturalization Service has published in the Federal Register a correction of the address to which applications should be mailed by individuals applying for legalization or Family Unity status under the Legal Immigration Family Equity (LIFE) Act and LIFE Act Amendments. The notice explains that the address provided in the INS interim regulations contained an error (for a discussion of these regulations, *see* "Attorney General Issues Interim Rule Governing Applications for "Late Legalization" under the LIFE Act," IMMIGRANTS' RIGHTS UPDATE, June 29, 2001, p. 1). The correct address is:

United States Immigration and Naturalization Service
P.O. Box 7219
Chicago, IL 60680-7219

66 Fed. Reg. 45,694 (Aug. 29, 2001).

INS ISSUES REGULATIONS IMPLEMENTING THE CHILD CITIZENSHIP ACT – The Immigration and Naturalization Service has issued interim regulations to implement the Child Citizenship Act (CCA), which took effect on Feb. 27, 2001. The regulations explain the criteria the INS will use in adjudicating applications for certificates of citizenship filed on behalf of children claiming automatic derivation of citizenship or "citizenship on application." The regulations also provide that the CCA's benefits do not extend to individuals who were already over 18 years of age on the statute's effective date. In related news, the Fifth and Ninth Circuit Courts of Appeal have also concluded that the CCA does not apply to individuals who already were 18 years of age or over on Feb. 27, 2001, and the Board of Immigration Appeals has reached the same conclusion in a precedent decision.

The CCA has two major components affecting citizenship law. First, it replaces former sections 320 and 321 of the Immigration and Nationality Act with a new section 320, which governs the criteria under which a child may automatically derive U.S. citizenship from the naturalization of a parent or from adoption by a U.S. citizen parent. Children who qualify under the statute "automatically" become citizens without having to apply for a certificate of citizenship or a passport, although they may obtain such documents in order to have proof of their status. Second, the CCA amends section 322 of the INA, which governs the circumstances in which a U.S. citizen parent can obtain a certificate of citizenship for a child born abroad who does not qualify for automatic derivation of citizenship under section 320; the regulations refer to this procedure as "citizenship on application." Although this procedure entails an application for a citizenship document, it is actually a form of naturalization, and the statute provides that the child becomes a citizen only after taking an oath of allegiance.

Under the new section 320, children automatically derive U.S. citizenship at the time that they satisfy all of the following three conditions: (1) at least one parent of the child is a U.S. citizen, whether by birth or naturalization; (2) the child is under 18 years of age; and (3) the child is "residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence." Individuals who met all of these conditions on Feb. 27, 2001, the effective date of the CCA, automatically became citizens on that date. However, the regulations provide that the CCA does not apply to individuals who were already 18 years of age or older on that date.

The statute provides that an adopted child of a U.S. citizen qualifies for automatic derivation of citizenship if the child satisfies the requirements of INA section 101(b)(1) (the section contains the definition of "child" applicable to the immigration provisions of the INA; this includes both children adopted under section 101(b)(1)(E) and orphans adopted under section 101(b)(1)(F)). The statute thus incorporates a number of specific requirements for adopted children (such as requirements that the adoption have occurred before the child reaches age 16 (18 for a sibling), and that the child have resided with the adopting parent for two years) and for orphans who are adopted (see INA § 101(b)(1)(F)).

For children other than adopted children, the regulations apply the INA's definition of "child" for naturalization purposes, which can be found at INA section 101(c)(1). This definition includes a child who has been "legitimated" if the legitimation took place before the child reached 16 years of age.

The supplemental information to the regulations states that the INS and the State Dept. have not yet decided how to interpret the requirement that the child be "residing in" the U.S., in addition to having lawful permanent resident status. The INS notes, on the one hand, that "residence" under the INA is defined as a person's "principal, actual dwelling place." But on the other hand, there are circumstances in which an LPR may live outside the U.S. without losing that status and in which U.S. citizens may live abroad while still being considered to have a residence in the U.S. Pending a decision about this question and until further notice, the INS will consider this requirement satisfied only if, on or after Feb. 27, 2001, (1) the child is admitted as an LPR and actually living in the U.S., or (2) the child was previously admitted as an LPR, was absent from the U.S. on Feb. 27, 2001, but subsequently was readmitted as an LPR.

Revised INA section 322, governing "citizenship on application," allows a U.S. citizen parent to obtain a certificate of citizenship for a child born abroad if:

(1) the parent either

(A) has been physically present in the U.S. or its outlying possessions for a period or periods totaling five years, at least two of which occurred after attaining the age of 14 years; or

(B) has a citizen parent (the child's grandparent) who has been physically present in the U.S. or its outlying possessions for a period or periods totaling five years, at least two of which occurred after attaining the age of 14 years;

(2) the child is under 18 years of age; and

(3) the child is "residing outside of the U.S. in the legal and physical custody of the citizen parent, is temporarily present in the U.S. pursuant to a lawful admission, and is maintaining such lawful status."

Both section 320 (automatic derivation of citizenship) and 322 (citizenship on application) require that the child be in the "legal custody" of a U.S. citizen parent. Under the regulations, the INS will presume that a U.S. citizen parent has legal custody in the following situations: (1) where "a biological child . . . currently resides with both natural parents (who are married to each other, living in marital union, and not separated)"; (2) where "a biological child . . . currently resides with a surviving natural parent (if

the other parent is deceased)"; or (3) where "a biological child born out of wedlock . . . has been legitimated and currently resides with the natural parent."

In cases of adopted children, the INS will find that a citizen parent has legal custody "based on the existence of a final adoption decree." In cases of a child of divorced or legally separated parents, the INS will consider a citizen parent to have legal custody where the parent has been granted "an award of primary care, control, and maintenance" of the child by a court of law or other appropriate government entity. Where there is an award of "joint custody," the INS will consider both parents to have legal custody. In cases where the issue of custody is not explicitly addressed in a divorce decree or a separation agreement, the determination of legal or joint custody will be based on the laws of the state or country of residence. The regulations state that "[t]here may be other circumstances under which the Service will find the U.S. citizen parent to have legal custody for purposes of the CCA."

As was true of the prior version of section 322, the current version requires a lawful admission, but the child need not have been admitted as an LPR. In one respect, the current version is significantly more restrictive than the prior law, because it also requires that the child *maintain* lawful status in the U.S. However, the current statute does expressly provide that the application "may be filed from abroad," and once an interview is scheduled State Dept. instructions issued under the prior law would allow the child to be issued a B-2 tourist visa (see cable reproduced at 72 INTERPRETER RELEASES 350 (Mar. 13, 1995)).

The supplemental information to the regulation states that the INS will use the new law to adjudicate applications for "citizenship on application" under INA section 322 that were filed before Feb. 27, 2001. The statement indicates that the INS will deny applicants who failed to maintain lawful status after an original lawful admission. However, this appears contrary to an express provision of the CCA, which states that as of Feb. 27, 2001, the act "shall apply *to individuals who satisfy the requirements of section 320 or 322* [of the INA] as in effect on such effective date" (emphasis added).

The regulations specify the different forms and the supporting documents and evidence that should be submitted to apply for a certificate of citizenship. In general, U.S. citizen parents applying for a certificate of citizenship on behalf of a biological child should file Form N-600. U.S. citizen parents applying for a certificate of citizenship on behalf of an adopted child should file Form N-643. For those cases under INA section 322, where the application for citizenship on application is based on the prior residence of a citizen grandparent, the Form N-600/N-643 Supplement A must also be submitted. The supplementary information to the regulation notes that the INS is considering consolidating all of these forms into the Form N-600.

As noted above, the Fifth and Ninth Circuits have ruled that the CCA does not apply to individuals who were 18 years of age or older on Feb. 27, 2001. *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001); *Hughes v. Ashcroft*, 255 F.3d 752 (9th Cir. 2001). The Board of Immigration Appeals has also issued a precedent decision to the same effect. *Matter of Rodriguez-Tejedor*, 23 I. & N. Dec. 153 (July 24, 2001).

The interim regulations took effect on June 13, 2001.

66 Fed. Reg. 32,137–47 (June 13, 2001).

INS PROPOSES TO RAISE FEES FOR MANY APPLICATIONS AND PETITIONS – The Immigration and Naturalization Service has published a proposed rule in the Federal Register that would increase the fees charged for numerous categories of applications and petitions. The INS periodically reviews its fee schedule to ensure that the fees that are collected cover the full costs of providing all of the agency's adjudication and naturalization services. Fees that are collected go into the Immigration Examinations Fee Account (IEFA), which is the primary source of funding for the agency's Adjudications and Naturalization Program, as well as some other programs that Congress has directed. Some of the common applications and petitions for which fee increases are proposed are listed in the table below; the INS last reviewed and raised fees for some of these applications in 1999.

In the supplemental information published with the proposed rule, the INS explains that the 1999 partial review of fee levels used a different methodology than the agency used in its prior (1997) review and produced results that the INS "could not easily explain." For example, in January 1999, the fee for the N-400 (Application for Naturalization) was increased from $95 to $225. The INS believes that this increase was justified by the creation of the Naturalization Quality Procedures program. However, the 1999 fee review would have led to a further increase of this fee—to $345—even though "the processing of naturalization applica-

INS Forms and Fees

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

tions has remained fundamentally unchanged since January 1999." Because of "apparent problems" with the 1999 review, according to the supplemental information, "the Service is relying primarily on the 1997 review" in determining the proposed fees. The agency has made adjustments for anticipated inflation, since the INS expects these fees to be maintained through 2003. The agency also has added $5 to the fee for each application and petition to cover information technology and quality assurance costs. The INS is also proposing to double the fee for fingerprinting, raising it from $25 to $50.

One anomaly with the proposed fees is that, while the fee for the I-485 adjustment application would be raised from $220 to $255, the fee for an I-485 application on behalf of an applicant for legalization under the Legal Immigration Family Equity (LIFE) Act of 2000 and the LIFE Act Amendments is $330. In issuing interim regulations to implement LIFE legalization in June 2001, the INS established the fee for adjustment under the LIFE Act based on the 1999 fee review, which indicated that the full cost of adjudicating Form I-485 is $330. The INS explains that it "now questions the methodology and limited nature of [the 1999] review and is proposing that the Form I-485 fee be $255." However, due to possible "start-up costs associated with processing legalization applicants," the INS will keep the separate LIFE Act fee in effect for now while the agency undertakes a review of that fee. After that review, the INS will undertake separate rulemaking regarding the LIFE Act fee.

The INS invites public comment, to be considered in the development of a final rule. Comments must be received on or before Oct. 9, 2001. 66 Fed. Reg. 41,456–62 (Aug. 8, 2001).

INS GENERAL COUNSEL ISSUES MEMO ON MOTIONS TO REOPEN ADJUSTMENT OF STATUS APPLICATIONS – Anticipating an increase in adjustment of status applications filed under Immigration and Nationality Act section 245(i), on May 17, 2001, Immigration and Naturalization Service General Counsel Bo Cooper issued a memo reviewing circumstances when the INS may join in motions to reopen based on status adjustment applications.

The Legal Immigration and Family Equity (LIFE) Act extended until Apr. 30, 2001, the deadline by which individuals could apply to adjust their status under INA section 245(i). That section allows immigrants who entered the U.S. without inspection and who qualify for immigrant visas to adjust to lawful permanent status while in the U.S., provided they pay an additional $1000 fee. Immigrants who filed adjustment of status applications and are in removal proceedings before the immigration court or the Board of Immigration Appeals may file motions to reopen their cases based on those applications. The general counsel's memo addresses how and under what conditions local district counsel may join such motions. The memo supercedes a Dec. 23, 1996, memorandum which set forth a standard of "extraordinary and compelling circumstances" that applicants must have met in order to obtain the INS's acquiescence for filing motions to reopen.

The memo states that the INS may join in a motion to reopen (or a motion to remand before the BIA) for consideration of an adjustment of status application pursuant to INA section 245(i) if (1) adjustment of status was not available to the immigrant at the former hearing; (2) the individual is statutorily eligible for adjustment of status; and (3) the individual merits a favorable exercise of discretion.

Process for Obtaining Motions to Reopen. To obtain INS consent to file a motion to reopen with the immigration court or BIA, the immigrant's attorney or representative must contact the district counsel's office in the jurisdiction that represented the INS during the individual's immigration proceedings. The request must

- be in writing;
- be supported by affidavits or other evidence establishing proof of current eligibility for adjustment; and
- include, if available and applicable, a complete copy of the adjustment application and visa petition approval.

The motion should include a stipulation that the INS may still contest the merits of the individual's case in a reopened proceeding. As a condition for giving consent, the district counsel's office may request that the joint motion be revised. The general counsel directs local counsel to reply to requests for joint motions in a timely manner.

Statutory Bars. The memo states that the INS may not join motions to reopen if individuals are ineligible for adjustment due to any applicable statutory bars. The memo specifically references bars triggered due to overstays of grants of voluntary departure.

Under INA 240B(d), an individual in removal proceedings who is permitted to voluntarily depart and fails to do so is ineligible to adjust status for a ten-year period. Under prior law (INA § 242B(c)(1996)), except in exceptional circumstances, an individual in deportation proceedings who was granted voluntary departure and remained in the U.S. beyond the departure date was not eligible for adjustment of status under INA section 245 for a period of five years after the scheduled departure date. That restriction only applies where the individual received a written notice in English and Spanish and an oral notice in the individual's native language or in a language comprehensible to the individual. The notice had to contain information about the consequences of remaining in the United States after the scheduled departure date.

In deportation cases commenced before section 242B took effect and in 242B cases where the written and oral warnings were not provided, failure to depart the U.S. pursuant to a voluntary departure order does not act as a statutory bar to relief. However, such a failure would be considered a negative factor when the INS exercises discretion.

Discretion. The memo outlines factors that the INS should consider in favorably exercising discretion (it notes that the list is not exhaustive):

- the hardship to the individual and/or to his or her U.S. citizen or lawful permanent resident family members if the individual were required to leave the U.S. and adjust status through consular processing (the three- and ten-year bars should also be considered);
- the individual's criminal history, if any;
- the number and severity of the immigration violations (a deportation or removal order resulting from a failure to depart after a grant of voluntary departure is considered a weighty negative factor);
- whether the individual has cooperated with a law enforcement agency or whether his or her continued presence in the U.S. is necessary for a criminal or civil investigation or prosecution; and

• whether the individual's removal is consistent with INS objectives.

The INS memo also states that if INS counsel decides to join in a motion to reopen based on an adjustment of status application, and if the INS counsel is confident that the INS would approve it, the joint motion to the immigration judge should simultaneously propose a "remand" of the proceedings to the INS for its adjudication. The memo instructs counsel to use Form I-471 or a similar local procedure for this purpose. In addition, any remand or joint motion to terminate should contain a stipulation, such as that contained in Form I-471, that the termination is conditioned upon approval of the adjustment of status application.

Memorandum of INS General Counsel Bo Cooper, May 17, 2001.

STATE DEPT. ISSUES MEMO EXPLAINING AFFIDAVIT OF SUPPORT REQUIREMENTS UNDER CHILD CITIZENSHIP ACT – The State Dept. has issued a memo listing categories of immigrant children who, under the Child Citizenship Act of 2000 (CCA), need not file an affidavit of support. The June 16, 2001, memo follows a May 17, 2001, Immigration and Naturalization Service policy memo that also addressed affidavit of support requirements under the CCA (see "INS Issues Guidance Identifying Situations Where Affidavits of Support Are Not Required," IMMIGRANTS' RIGHTS UPDATE, June 29, 2001, p. 6). The State Dept. memo also lists categories of immigrants for whom the affidavit of support is still required.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 established a new, enforceable affidavit of support that must be submitted by all intending immigrants applying for adjustment of status or an immigrant visa. The new affidavit of support is a contract that requires an immigrant's sponsor to support the immigrant at 125 percent of the federal poverty level. The sponsor also agrees to support the immigrant until the immigrant becomes a U.S. citizen. Since the obligation to support the immigrant terminates when the immigrant acquires U.S. citizenship, the INS and the State Dept. have made a policy decision that an affidavit of support will not be required for beneficiaries under the CCA—that is, for foreign-born children who become citizens upon immigrating to the U.S. (see "INS Issues Regulations Implementing the Child Citizenship Act," p. 5).

The State Dept. memo states that, effective immediately, an affidavit of support will not be required for the following categories of immigrants (note: "IR" is a code used to distinguish different categories of immigrant relatives. The code appears on the green card and indicates how a lawful permanent resident immigrated to the U.S. IR codes 2 through 4 refer to children processed at a consulate abroad):

• an orphan classified IR-3 (IR-3 is a designation for an orphan adopted or to be adopted by a U.S. citizen), provided that the child will be admitted to the U.S. before he or she turns 18 and will reside in the U.S. with, and in the custody of, the adoptive U.S. citizen parent;

• an adopted child classified IR-2 (IR-2 is a designation for a child of a U.S. citizen) who satisfies the requirements of Immigration and Nationality Act section 101(b)(1)(E) with respect to a U.S. citizen parent. The provision requires the child to live with the parents for at least two years. The child must be admitted to the U.S. while still under age 18 and must also reside in the U.S. with, and in the custody of, the adoptive U.S. citizen parent;

• a child classified IR-2, provided that the child will be admitted to the U.S. while still under the age of 18 and will reside in the U.S. with, and in the custody of, the U.S. citizen parent.

The memo also states that an affidavit of support will continue to be required for all other family-based immigrants, including biological and adopted children of U.S. citizens who are not eligible for automatic naturalization upon admission as a lawful permanent resident. Specifically, an affidavit of support will continue to be required for

• any immigrant classified IR-2 based on a stepparent-stepchild relationship with a U.S. citizen;

• any immigrant classified IR-2 who will be age 18 or over upon admission to the U.S. as a lawful permanent resident;

• any immigrant classified IR-2 who will not be residing in the U.S.;

• any immigrant classified IR-2 who will not be residing with, and in the legal custody of, the U.S. citizen parent; and

• any immigrant classified IR-4 (IR-4 designates an orphan adopted by a U.S. citizen whose processing may have begun abroad but needed to be completed in the U.S.).

An immigrant who is exempt from presenting an affidavit of support is nevertheless still required to demonstrate that he or she is not likely to become a public charge. Absent unusual circumstances, however, it will not be likely that the public charge ground of inadmissibility will be an issue.

Unclassified State Dept. Telegram (June 26, 2001).

Litigation

SUPREME COURT UPHOLDS HABEAS JURISDICTION, FINDS 212(c) RELIEF STILL AVAILABLE TO CERTAIN IMMIGRANTS IN REMOVAL PROCEEDINGS – In a closely divided decision, the United States Supreme Court has ruled that habeas corpus jurisdiction is still available to immigrants who have been ordered removed from the U.S. The Court rejected the contention of the Immigration and Naturalization Service that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) eliminated this basis for jurisdiction. The Court also ruled that the provision of the IIRIRA that repeals section 212(c) does not apply to individuals who would have been eligible for a 212(c) waiver of deportation at the time that they pled guilty to the offense.

The respondent in this case, a Mr. St. Cyr, is a citizen of Haiti who was admitted to the U.S. as a lawful permanent resident in 1986. On Mar. 8, 1996, he pled guilty to a charge of selling a controlled substance in violation of Connecticut law. Under the immigration statutes as they existed at the time of the guilty plea, the conviction made St. Cyr deportable but still eligible for a waiver under section 212(c) of the Immigration and Nationality Act. However, the INS did not commence removal proceedings against St. Cyr until Apr. 10, 1997, after both the AEDPA and the IIRIRA became effective. The immigration judge and the Board of Immigration Appeals concluded that St. Cyr was not eligible for any relief and ordered him removed from the U.S. St. Cyr then filed a

habeas corpus petition to contest the BIA's decision. The district court and the Second Circuit ruled in favor of St. Cyr, and the INS then took the case to the Supreme Court.

On appeal, the first issue before the Court was whether the AEDPA and the IIRIRA deprive the federal courts of habeas corpus jurisdiction to consider challenges to orders of removal. Justice Stevens, writing for the majority, noted that two principles weighed heavily in favor of continued habeas jurisdiction: (1) the "strong presumption in favor of judicial review of administrative action" and (2) the "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." The Court also noted that to interpret the statute to repeal habeas jurisdiction would raise serious constitutional concerns because of the Constitution's Suspension Clause, and this consideration also supports an alternative interpretation. The majority concluded that neither the AEDPA nor the IIRIRA repealed habeas jurisdiction.

In its analysis, the Court rejected the INS's contention that the common law habeas review that is protected by the Suspension Clause does not encompass claims such as that of St. Cyr. The INS argued that historic habeas is not available to review discretionary determinations. Since St. Cyr was unquestionably deportable and his claim only concerned discretionary relief, the INS contended that it could not be reviewed by habeas. The Court rejected this contention, noting that St. Cyr raised a pure question of law, that there is evidence of habeas having been used even before 1789 to redress the improper exercise of official discretion, and that habeas historically has been used to review legal (as opposed to factual) determinations related to discretionary relief in immigration cases.

Having found jurisdiction, the Court then addressed St. Cyr's legal claim on the merits—whether the IIRIRA bars St. Cyr from being eligible for a 212(c) waiver. The Court found that St. Cyr's March 1996 guilty plea had two important legal consequences: (1) he became subject to deportation and (2) he became eligible for a 212(c) waiver of deportation. Subsequently, section 304(b) of the IIRIRA repealed section 212(c). The issue, therefore, is whether that provision applies to St. Cyr and changes the second legal consequence of his plea.

The Court applied to this question the principles of retroactivity analysis that it has developed in a series of cases. The first step of this analysis is to determine whether Congress in the statute has unambiguously communicated the intent to have its provisions operate retroactively and not retrospectively. The Court noted that Congress has the power to act retroactively. However, because of the "presumption against retroactive legislation," a statute "may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result." If no such clear statement is found, the second step of the analysis is to determine whether applying the statute has an impermissible retroactive effect.

As to the first step, the Court concluded that no provision of the IIRIRA unmistakably addresses whether the repeal of section 212(c) applies to individuals who pled guilty to crimes when they would have been eligible for a waiver. The Court noted that although some provisions of the IIRIRA explicitly specify a retroactive application, that is not the case with section 304(b). Finding the statute ambiguous with respect to the temporal applicability of section 304(b), the Court then turned to the second step of retroactivity analysis—whether the statute would be retroactive if applied to such individuals.

As to the second step, the Court noted that the determination of whether a statute operates retroactively "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin v. Hadix*, 527 U.S. 343, 357–58 (1999) (*quoting Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994)). This determination "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin*, 527 U.S. at 358 (*quoting Landgraf*, 511 U.S. at 270).

The Court concluded that "IIRIRA's elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly 'attaches a new disability, in respect to transactions or considerations already past'" (*quoting Landgraf*, 511 U.S. at 269). The Court found "not particularly helpful" the INS contention that deportation proceedings are "inherently prospective" such that immigration law can never have a retroactive effect. The Court stated: "[O]ur mere statement that deportation is not punishment for past crimes does not mean that we cannot consider an alien's reasonable reliance on the continued availability of discretionary relief from deportation when deciding whether the elimination of such relief has a retroactive effect."

The Court also rejected the INS's argument that the fact that 212(c) is discretionary makes it's repeal not impermissibly retroactive. As the Court noted, "There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." Thus, "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect."

The Court therefore concluded: "[Section] 212(c) relief remains available for aliens, like respondent, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." Notably, unlike some of the circuit courts of appeal that have ruled on this issue (see, e.g., "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," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2001, p. 8), the Court's decision does not require individuals to show that they in fact relied on the availability of relief when they pled guilty in order to be eligible for section 212(c) relief. Rather, the Court's analysis is based on more general principles of reasonable expectation and reliance.

In a companion case, the Supreme Court upheld the ruling of the Second Circuit dismissing petitions for review for lack of jurisdiction because the petitioners had conceded that they were deportable because of aggravated felony convictions. Pursuant to the Court's decision in the principal case, the court of appeals has no jurisdiction to hear such claims, which must instead be brought in district court by petition for habeas corpus.

INS v. St. Cyr, 533 U.S. __, 121 S.Ct. 2271 (June 25, 2001) (upholding habeas jurisdiction); *Calcano-Martinez v. I.N.S.*, 533 U.S. __, 121 S.Ct. 2268 (June 25, 2001) (dismissing petitions for review).

SUPREME COURT HOLDS THAT INDEFINITE DETENTION IS UNCONSTITUTIONAL – The United States Supreme Court has ruled that the Immigration and Naturalization Service cannot detain indefinitely individuals who have been ordered removed but cannot be repatriated to their homelands. In reaching the ruling, the Court read an "implicit 'reasonable time' limitation" in the statute under which the INS had been indefinitely detaining such persons after the 90-day removal period. Under that reading, the Court held, individuals may be detained only for "periods reasonably necessary to bring about [their] removal from the U.S. [The statute] does not permit indefinite detention."

With the caveat that not all individuals must be released after six months, for the sake of uniform administration by the federal courts, the Court set a limit of six months as the time period in which removals must be accomplished. After that time, once the individual "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must rebut that showing in order to continue his or her detention.

After an individual has been ordered removed, the INS has 90 days to remove the individual. However, repatriation is difficult to accomplish for some individuals, such as those without nationalities or persons born in countries that do not have repatriation treaties with the U.S. (such as Cuba or Vietnam). The INS's policy has been to hold such individuals in custody while the agency sought their acceptance by other countries. If no country agreed to accept them, individuals could, under the "post-removal-period detention statute" (8 U.S.C. section 1231(a)(6)), be held in INS custody indefinitely.

The post-removal-period detention statute applies to individuals who are inadmissible or removable because they have committed crimes or violated nonimmigrant status requirements or for reasons of security or foreign policy. It also applies to individuals whom the attorney general has determined are a risk to the community or are unlikely to comply with the removal order. After the 90-day removal period, the statute provides that the government "may" continue an individual's detention or release him or her under supervision. The statute's implementing regulations further require INS district directors to review the individual's records to decide whether he or she should be detained or released after the 90-day period expires. If the district director decides to continue an individual's detention, the INS conducts another review of the decision after three months. Thereafter, a panel of INS officials must decide whether to release the individual under supervision or further detain him or her. Under the regulations, in order to secure release, the detainee must show, "to the satisfaction of the attorney general," that he or she poses neither danger to the community nor risk of flight.

The Supreme Court decision consolidates and adjudicates appeals in two cases, one arising in the Fifth Circuit Court of Appeals and the other in the Ninth Circuit. *Zadyvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999), and *Kim Ho Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000). Both cases involve lawful permanent residents who, by filing petitions under the federal habeas corpus statute (28 U.S.C. § 2241), challenged their detention by the INS beyond the 90-day removal period. In Zadyvydas's case, difficulties in establishing his nationality accounted for his continued detention, while for Ma, the lack of a repatriation treaty with the country of his nationality (Cambodia) kept him in INS custody. The Fifth Circuit ruled that Zadyvydas's continued detention did not violate the Constitution, and the Ninth Circuit reached the opposite conclusion in affirming Ma's release.

Before turning to the merits of the appeals, the Supreme Court first addressed jurisdictional issues. The government argued that two statutory provisions, 8 U.S.C. sections 1231(h) and 1252(a)(2(B)(ii), preclude federal courts' jurisdiction to review Zadyvydas's and Ma's cases. The court rejected both arguments, noting that section 1231(h) simply forbids courts from construing "that section 'to create any . . . procedural right or benefit that is legally enforceable.'" As for section 1252(a)(2(B)(ii), which proscribes federal court review of decisions specified to be in the discretion of the attorney general, the Court noted that Zadyvydas and Ma do not seek review of the attorney general's exercise of discretion. Rather, the Court held, they are challenging the extent of the attorney general's authority under the post-removal-period detention statute. Noting that the "extent of that authority is not a matter of discretion," the Court found that neither provision cited in the government's jurisdictional challenges affect the availability of the federal habeas statute to initiate statutory and constitutional challenges to post-removal-period detention.

Citing a "cardinal principle" of statutory interpretation—that when an act raises serious doubts as to its constitutionality, a court should try to see if a construction that avoids the constitutional question is possible—the Supreme Court read an implicit limitation into the statute. As noted above, it thus held that post-removal-period detention must be limited to a period reasonably necessary to bring about removal of individuals from the U.S.

The Supreme Court began its analysis by observing that a statute permitting indefinite detention would raise serious constitutional problems. Noting that protection from imprisonment without due process of law lies at the heart of the Fifth Amendment's Due Process Clause, the Court reviewed examples of government detention it has found permissible. For example, government detention does not violate the Fifth Amendment when it is ordered in criminal proceedings with adequate procedural protections. Detention is also permissible only in "special and 'narrow' nonpunitive 'circumstances,'" in which special justification, "such as harm-threatening mental illness, outweighs the individual's constitutionally protected" right to avoid physical restraint.

The Court went on to note that the proceedings at issue in the matter before it are civil, not criminal, and stated its assumption that the purpose and effect of those proceedings are nonpunitive. Ruling that no sufficiently strong special justification for indefinite civil detention exists in either Zadyvydas's or Ma's case, the Court rejected the government's two justifications for continued detention: ensuring individuals' appearance at future immigration proceedings and "preventing danger to the community."

According to the Court, the first justification, which seeks to prevent flight, is weak or nonexistent where removal is remote. As to the justification for preventive detention, the Court noted that it has upheld such detention only when limited to especially dangerous individuals, and even in these cases it has demanded that strong procedural safeguards be in place. In cases in which preventive detention is potentially indefinite, the Court has also

required that the element of danger be "accompanied by some other special circumstance," like mental illness, that contributes to the danger. However, the Court ruled, despite the potentially permanent nature of the confinement under review, the statutory provision authorizing post-removal-period detention does not apply narrowly to dangerous individuals. Indeed, it applies broadly, encompassing even persons ordered removed for tourist visa violations. Once the flight risk justification is removed, the Court held, the only special circumstance that remains is the individual's removal status, "which bears no relation to a detainee's dangerousness."

The Court also found it troubling that the sole procedural protections available to detainees are afforded in administrative proceedings in which the detainee bears the burden of proving he or she is neither dangerous nor a flight risk. The Court noted that it has previously suggested that granting administrative bodies the nonreviewable authority to make decisions implicating fundamental rights may run afoul of the Constitution. "The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious," it stated.

Citing *Shaughnessy v. U.S. ex rel Mezei,* U.S. 206 (1953), the government also argued that, from a constitutional perspective, alien status itself can justify indefinite detention. The *Mezei* case involved a lawful permanent resident who left the country and was subsequently refused admission. Such individuals were placed in exclusion proceedings and were treated as though they had not entered the country. The court distinguished between persons who make lawful entry into the U.S. and those like Mezei who are considered not to have done so. The Court thereby restated the longstanding principle that persons who are in the country enjoy greater due process rights than those who stand outside its borders.

In arguing for its position, the government also cited Supreme Court cases holding that Congress has plenary power to create immigration law and that the judicial branch must defer in this area to the executive and legislative branches' decisions. The Court responded by stating that implementing such power is subject to limitations; Congress must choose constitutionally permissible means of doing so.

Finally, the Court stated that if Congress makes its intent clear in its statutes, courts must give effect to such intent. However, it could find no clear demonstration of congressional intent to grant the attorney general the power to hold indefinitely individuals ordered removed.

Returning to Zadvydas's and Ma's cases, the Court found neither circuits' ruling satisfactory. The Fifth Circuit had based its holding that Zadvydas's detention is lawful on his failure to show his removal would be impossible. This standard, the Court held, seems to require that individuals must show the absence of any likelihood of removal, no matter how improbable or unforeseeable. The Court ruled that the imposition of such a standard far exceeds its reading of the statute's limits. In Ma's case, the Court found that the Ninth Circuit may have reached its decision based solely on the lack of a U.S. repatriation treaty with Cambodia. The lower court should have given more weight to the future likelihood of such a treaty's ratification, the Court held. Accordingly, it ordered both decisions vacated and remanded the cases for further proceedings consistent with its opinion.

Zadvydas v. Davis, et al., 121 S. Ct. 2491 (June 28, 2001).

9TH CIRCUIT HOLDS THAT IIRIRA DID NOT MODIFY THE STANDARD FOR A STAY OF REMOVAL – The U.S. Court of Appeals for the Ninth Circuit has issued an en banc decision finding that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) did not create a new, high standard for the court to use to determine whether to grant a stay of removal while a petition for review is pending. The decision overturns a prior ruling of a three-judge panel of the court, which had concluded that section 242(f)(2) of the Immigration and Nationality Act, part of the "permanent rules" of the IIRIRA, required individuals seeking a stay to either "show by clear and convincing evidence that the [removal] order was based on an erroneous finding of fact" or "establish that the order was manifestly contrary to law" (*see* "9th Circuit: High Standard Must Be Met for Court to Stay Removal Order Pending Its Consideration of Petition for Review," IMMIGRANTS' RIGHTS UPDATE, Oct. 19, 2000, p. 9). The en banc decision holds that section 242(f)(2) does not apply to stays of removal and that applications for stays are governed by the same balancing test that the court has traditionally used in cases where a stay is not automatic. In this case, applying the balancing test to the case before it, the court found that the petitioner failed to meet this standard and denied his motion for a stay.

The petitioner in this case, a Mr. Andreiu, is a Rumanian national who filed a petition to review an order of the Board of Immigration Appeals that denied his application for asylum and withholding of removal and ordered his removal from the United States. In conjunction with the petition, Andreiu requested a stay. The Immigration and Naturalization Service opposed the motion, contending that section 242(f)(2), which restricts the power of courts to "enjoin the removal of any alien pursuant to a final order," applies to stays and imposes a high standard that must be met. A motions panel of the court appointed counsel for Andreiu and ordered briefing and oral argument of the issue.

A majority of the three-judge panel concluded that the reference to an order to "enjoin" removal in section 242(f)(2) encompasses a stay of removal. The majority concluded that individuals seeking a stay must either "show by clear and convincing evidence that the [removal] order was based on an erroneous finding of fact" or "establish that the order was manifestly contrary to law." Judge Thomas dissented, arguing that the majority's decision is contrary to the plain language of section 242(f), the structure of section 242 as a whole, and asylum theory. The petitioner then filed a motion for reconsideration and suggestion for rehearing *en banc*, which the Ninth Circuit granted.

In its en banc ruling, the Ninth Circuit concluded as a matter of statutory interpretation that the term "enjoin" as used in section 242(f)(2) does not encompass a "stay." The court noted that Congress expressly referenced stays in section 242(b)(3)(B) (providing that a stay is not automatic upon the filing of a petition for review) and could easily have added either the term "stay" or "restrain" to section 242(f)(2) had it intended the provision to encompass stays. The court pointed to several other features of the text and structure of section 242 as a whole that lend support

to the conclusion that section 242(f)(2) does not apply to stays. And the court also noted that the high standard sought by the INS would lead to absurd results, as it "would effectively require the automatic deportation of large numbers of people with meritorious claims, including every applicant who presented a case of first impression." Because applicants for a stay would have to show "a certainty of success," this standard also would require full-scale briefing at the very beginning of the appellate process, contrary to the detailed procedure that the statute establishes for review of BIA decisions. For all of these reasons, the court concluded that section 242(f)(2) does not impose a new standard for a stay.

Instead, the court found that the balancing test that the court explained in *Abbassi v. INS*, 143 F.3d 513 (9th Cir. 1998) (a deportation case subject to the IIRIRA "transitional rules" which provide that a stay is not automatic), applies to stay requests in removal cases. Under this standard, in order to obtain a stay the petitioner must show "either (1) a probability of success on the merits and the possibility of irreparable injury or (2) that serious legal questions are raised and the balance of hardships tips sharply in the petitioner's favor." *Id*. at 514 (enumeration added). In this case, the court concluded that Andreiu failed to meet either test.

Andreiu v. Ashcroft, 253 F.3d 477 (9th Cir. 2001) (en banc).

THREE CIRCUIT COURTS RULE FELONY DUI CONVICTION NOT "AGGRAVATED FELONY" – The U.S. Circuit Courts of Appeal for the Second, Seventh, and Ninth Circuits have joined the Fifth Circuit in ruling that a felony drunk driving conviction is not a "crime of violence" such as to constitute an "aggravated felony" (see "5th Circuit Holds That Texas Felony DWI Is Not a Crime of Violence," IMMIGRANTS' RIGHTS UPDATE, Mar. 29, 2001, p. 5). On the other hand, the Tenth Circuit has agreed with the Board of Immigration Appeals that a felony driving under the influence (DUI) conviction with bodily injury is a "crime of violence."

As was also the case with the Fifth Circuit decision, the Ninth Circuit decision arose in the context of criminal sentencing. Construing a crime as an "aggravated felony" can trigger a substantial increase in the prison sentence of a person who is convicted of being in the United States unlawfully after having been removed from the U.S. following conviction for that crime. The Second, Seventh, and Tenth Circuit decisions all arise in the immigration context, where the issue is whether the individual is deportable as an aggravated felon.

All of these cases turn on the question of whether the state felony DUI statute for which the individual was convicted encompasses conduct broader than that the definition of a "crime of violence" in 18 U.S.C. section 16(b). That statute applies to any felony offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." If an individual could be convicted under the terms of the DUI statute for conduct that is not encompassed within section 16(b), then it should not be considered a "crime of violence." The Second, Fifth, and Seventh Circuits concluded that section 16(b) requires a level of intent greater than recklessness, because it requires a risk of the *use* of force rather than simply a risk of injury. While no specific intent to cause harm is required to make the statute applicable, the courts found that, at a minimum, a volitional act is necessary. All three circuits ruled that, since the state felony offenses at issue encompassed reckless behavior, they were broader than section 16(b) and could not be considered "crimes of violence."

The Seventh Circuit decision distinguishes the earlier Seventh Circuit decision in *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995), which found that a federal sentencing guideline containing language similar but not identical to the above quoted phrase encompassed recklessness. The most recent decision distinguishes *Rutherford* because of a key difference between the language of the sentencing guideline and the language of section 16(b): the sentencing guideline requires only "conduct that presents a serious potential risk of physical injury."

The Ninth Circuit decision uses a different analysis, since the court has previously ruled that section 16(b) encompasses reckless behavior. *United States v. Ceron-Sanchez*, 222 F.3d 1169 (9th Cir. 2000) (Arizona conviction for aggravated assault constitutes "crime of violence"); *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001) (conviction for involuntary manslaughter constitutes "crime of violence"). The most recent decision distinguishes those cases by finding that the offense at issue—California Vehicle Code section 23153—encompasses negligent as well as reckless behavior and thus is broader than section 16(b) and is not a "crime of violence."

The Tenth Circuit, on the other hand, upheld the BIA's conclusion that section 16(b) encompasses reckless behavior and concluded that an Idaho conviction for driving under the influence, after the convicted person had pled guilty or been found guilty of two previous violations within five years, constitutes a "crime of violence." *Dalton v. Ashcroft*, __ F.3d __, No. 00-4123 (2d Cir. Jul. 20, 2001); *U.S. v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001); *Bazan-Reyes v. Ashcroft*, 256 F.3d 600 (7th Cir. Jul. 5, 2001); *U.S. v. Trinidad-Aquino*, __ F.3d __, No. 00-10013 (9th Cir. Aug. 8, 2001); *Tapia-Garcia v. INS*, 237 F.3d 1216 (10th Cir. Jan. 19, 2001).

FEDERAL JUDGE ORDERS INS DISTRICT DIRECTOR TO CONSENT TO JUVENILE COURT PROCEEDING – In response to a 17 year-old detainee's request for relief, an Illinois federal judge ordered the Immigration and Naturalization Services' Chicago district director to consent to state court jurisdiction over the juvenile. With the agency's consent secured, the juvenile can obtain a dependency order and thereby begin the process of applying for special immigrant juvenile status.

The juvenile is a Chinese girl who, from the age of 6, suffered severe and frequent abuse at the hands of her mother. One of her earliest memories of abuse is of punishment she received for unfinished chores: the girl's mother beat her so hard that the broomstick she used to beat her broke over the girl's back. Another time, because the girl skipped her classes, her mother bound her and hung her by her hands. When the girl was 16 years old, a male cousin sexually assaulted her. Fearing another beating, the girl fled her home and attempted to enter the U.S. She was apprehended at the Dallas Airport and placed in INS custody. The girl's attorney sought to apply for Special Immigrant Status (SIJ) on the girl's behalf.

SIJ status is an immigration remedy available to children under 18 whom a juvenile court has determined are dependent and eligible for long-term foster care. It is also available to children whom a juvenile court has committed to state agency custody due to abuse, neglect, or abandonment. A dependency order from a juvenile court is a prerequisite to an application to the INS for SIJ status. In 1997 juvenile courts were divested of jurisdiction to rule on dependency issues in situations where the child is held in INS custody. Applicants for SIJ status must therefore request that the attorney general consent to the juvenile court's jurisdiction. In order to obtain consent, the juvenile must apply to the INS district director and present information concerning his or her circumstances.

On Apr. 23, 2001, the girl's attorney wrote the Chicago district director, requesting that the agency consent to juvenile court jurisdiction to rule on whether a dependency order should be issued. The letter noted the urgency of the request since the girl would soon turn 18. The INS failed to respond. On May 15, 2001, the girl's attorney submitted a second emergency request for consent. Having received no response, the girl's attorney submitted a third request. A fourth request was submitted on May 24, 2001. On May 25, 2001, noting that the girl did not provide sufficient evidence to support her claims of abuse, the district director denied her request. In addition, the INS found that since she had made eight calls to her mother in China over a five-and-a-half month period while in detention, she could not show that family reunification was not a viable option.

On May 30, 2001, only days before the girl would turn 18, her attorneys filed a federal action requesting a declaratory judgment and a temporary restraining order. The complaint alleged that the INS had violated the girl's procedural due process rights and that the agency's decision was issued in violation of the Administrative Procedures Act. Over INS objections concerning jurisdiction, the federal judge issued an oral ruling finding irreparable harm because the child would soon reach 18 and lose her eligibility to apply for SIJ status. The court also found that the INS had violated the girl's due process rights because the agency had not set forth a formal procedure for requesting consent from the district director or any appellate procedure to challenge a denial.

After negotiations, the INS agreed not to contest further the temporary restraining order. The lawsuit was therefore dismissed with the agreement of both parties. The INS also provided written assurances that it would not contest the jurisdiction of the state court when the child applied for SIJ status.

The Midwest Immigrant and Human Rights Center and Latham & Watkins in Chicago, Illinois represented the juvenile.

Z.Q.L. v. Perryman (Case No. 010-3952); U.S. District Court for the Northern District of Illinois (May 30, 2001).

Employment Issues

EEOC SETTLES SUIT AGAINST ARIZONA COMPANY FOR $3.5 MILLION ON BEHALF OF LOW-WAGE IMMIGRANT WORKERS – On Aug. 8, 2001, the U.S. Equal Employment Opportunity Commission (EEOC) made public a $3.5 million settlement of an employment discrimination lawsuit against Quality Art LLC, a defunct picture frame manufacturer based in Gilbert, Arizona. The suit alleged that 35 Latina workers, most of whom were Mexican and Guatemalan, were subjected to sexual harassment, national origin discrimination, and retaliation. The workers alleged that after they complained about the discrimination, the company reported some of them to the Immigration and Naturalization Service with the expectation that they would be arrested and deported.

The complaint, *EEOC v. Quality Art, LLC,* was filed in June 2000 in the U.S. District Court for the District of Arizona and alleged numerous violations by Quality Art of Title VII of the Civil Rights Act of 1964. The plaintiffs claimed that female employees, specifically those of Mexican or Guatemalan national origin, were subjected to offensive and intrusive searches. They also claimed that the Latina workers were subjected to sexual harassment and other harassment on the basis of sex, such as being assigned to sex-segregated positions. Moreover, the complaint alleged that Mexican and Guatemalan employees received lower wages and benefits than comparably situated non-Mexican and non-Guatemalan employees and thus were discriminated against based on their national origin.

Finally, the workers also alleged that the employer engaged in retaliatory conduct by terminating some employees based upon their involvement in the protected activity of protesting or otherwise opposing Quality Art's discriminatory employment practices, forcing some workers to quit their jobs based on the hostile work environment, and threatening to report employees to the INS. Despite the fact that Quality Art subsequently did contact the INS in an attempt to have the employees who protested against it detained and deported, the INS did not act on the employer's tip because it was aware of the underlying employment discrimination claims.

Quality Art filed for bankruptcy in December 2000. Subsequently, the EEOC reached an agreement with the defendant's bankruptcy trustee in order to avoid more expenses while waiting for the bankruptcy proceedings to conclude. The settlement agreement was approved as a stipulated judgment by Judge Stephen M. McNamee.

EEOC v. Quality Art, LLC, Case No. CIV00-1171PHX SMM.

WORKAUTHORIZATION EXTENDED FOR HONDURANS AND NICARAGUANS WITH TPS – The Immigration and Naturalization Services has issued a notice in the July 3, 2001, Federal Register automatically extending the employment authorization document (EAD) from July 5, 2001, to Dec. 5, 2001, for Hondurans and Nicaraguans who already had temporary protected status (TPS). This extension is designed to prevent gaps in employment authorization while their applications to re-register for TPS are processed. This notice comes on the heels of a notice by the INS published in the Federal Register on May 9, 2001, when it announced a one-year extension of the designation of Honduras and Nicaragua for the TPS program until July 5, 2002. The INS estimates that this extension of TPS covers an estimated 105,000 Hondurans and 5,300 Nicaraguans who have already applied for TPS.

In order to re-register for the extension, eligible Hondurans and Nicaraguans must have submitted Form I-821 (Application for Temporary Protected Status) and Form I-765 (Application for Employment Authorization) as well as two identification photo-

graphs. There was a $100 filing fee for those applicants seeking an extension of employment authorization until July 5, 2002, which must have been sent along with Form I-765. However, there was no filing fee for individuals seeking to re-register for TPS and not seeking an EAD extension. Applicants were not required to submit new fingerprints, either. Applicants should have mailed in their applications to the INS prior to Aug. 6, 2001, as the INS service centers must have physically received all completed re-registration applications for TPS by close of business on Aug. 6, 2001.

This extension covers only Nicaraguans and Hondurans who have been continually physically present in the United States as of Jan. 5, 1999, and who have continually resided in the U.S. since Dec. 30, 1998. Those who entered after Dec. 30, 1998, are not eligible for TPS. 66 Fed. Reg. 35,270 (July 3, 2001).

COURT GRANTS IMMIGRANT WORKERS PROTECTIVE ORDER REGARDING IMMIGRATION STATUS – In a case involving allegations of language-based discrimination, a federal magistrate judge has granted a protective order prohibiting defendants from inquiring into plaintiffs' immigration status. Under the order, the 25 Latina and Southeast Asian workers who filed the discrimination claim cannot be asked about their immigration and employment status during depositions. In their complaint, the plaintiffs allege that the defendants violated Title VII of the Civil Rights Act of 1964 in requiring plaintiffs to pass written tests in English, even though defendants knew they were all limited English-proficient.

In her decision of June 19, 2001, Magistrate Sandra Snyder of the U.S. District Court for the Eastern District of California agreed with the plaintiffs that allowing defendants to inquire into the workers' immigration status would have a chilling effect upon the plaintiffs and similarly situated workers asserting their workplace rights. In addition to specifically barring defendants from directly asking plaintiffs whether they are documented, the court also prohibited defendants from asking questions that bear on immigration status, such place of birth. However, the court did permit defendants to ask other indirect questions, such as those relating to place of marriage, educational background, current and past employment, damages, and date of birth. But defendants were not allowed to disclose the information gathered to "anyone other than the parties, their attorneys, and agents (including experts)."

The defendants had sought to obtain information about plaintiffs' past and present employment status by arguing they were entitled to it under the theory of "after-acquired evidence." The theory could have limited the extent of the plaintiffs' reinstatement and the amount of damages to which they would be entitled. In support of their position, the defendants claimed they needed to protect themselves from possible criminal liability. In rejecting the argument, the court noted that the Immigration Reform and Control Act of 1986 (IRCA) subjects employers to criminal liability only if the employer knowingly hired undocumented workers. Moreover, the court noted that the IRCA is silent on the question of whether an employer can use the discovery process in a civil suit to inquire about its employees' immigration status. It held that the defendants can always engage in an independent investigation of the plaintiffs' immigration status but could not ask about it directly in the course of discovery. The court stated that the employer should have inquired into its employees' work authorization when they were first hired and not after a complaint alleging discriminatory conduct was filed. In so holding, the court found its resolution was consistent with the leading Supreme Court case on the after-acquired evidence theory, *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995).

The plaintiffs are represented by the Employment Law Center, the ACLU of Northern California, the National Immigration Law Center, and the Law Offices of Richtel & Smith. The defendants have appealed Magistrate Snyder's order.

Rivera, et al. v. Nibco, et al., (U.S.D.C. E.D. Cal. June 19, 2001), No. Cv-F-99-6443AWI/SMS, 2001 U.S. Dist. LEXIS 8335.

TROPICANA HOTEL & CASINO TO PAY $75,000 FOR DISCRIMINATION CLAIMS – The U.S. Dept. of Justice has announced a settlement reached with the Tropicana Hotel and Casino in Atlantic City, New Jersey, in which the Tropicana agreed to pay $75,000 in civil penalties to settle allegations of workplace discrimination in violation of the antidiscrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA). This settlement was reached after an investigation of the Tropicana by the Dept. of Justice's Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) found 978 violations of IRCA, including a requirement that non–U.S. citizens produce documents issued by the Immigration and Naturalization Service.

As part of the agreement announced on Aug. 1, 2001, and approved by Judge Robert Barton of the Office of the Chief Administrative Hearing Officer (OCAHO), the OSC will train and educate the defendant's human resources personnel on fair hiring practices and monitor its hiring practices for two years.

PENNSYLVANIA SUPREME COURT ALLOWS MUSHROOM WORKERS TO UNIONIZE – Holding that the Pennsylvania Labor Relations Board (PLRB) had jurisdiction over an unfair labor practice charge filed by mushroom workers, the Pennsylvania Supreme Court has found that mushroom harvesters are not "agricultural laborers" excluded from the protections of the Pennsylvania Labor Relations Act of 1937 (PLRA).

After the Comité de Trabajadores de Campbell Fresh (Campbell Fresh was later bought by Vlasic Farms, Inc.) filed a representation petition with the PLRB, the union filed an unfair labor practice charge alleging the employer had threatened to close the production facility if the workers elected to form a union and also had promised employees that it would establish an in-house grievance committee if they withdrew their petition for representation. The employer, in turn, challenged the PLRB's jurisdiction over the charge, claiming that mushroom workers are agricultural laborers and, therefore, prohibited from organizing into a union, since agricultural workers are excluded from the provisions of the PLRA. Because it has consistently distinguished mushroom workers from agricultural laborers, the PLRB found it did have jurisdiction and that the employer had engaged in several unfair labor practices. The employer filed an appeal to the Commonwealth Court and subsequently to the Pennsylvania

Supreme Court.

The supreme court's decision in *Vlasic Farms, Inc. v. Pennsylvania Labor Relations Board,* issued on July 25, 2001, affirmed the lower court's decision, which found that the PLRA was modeled after the version of the National Labor Relations Act of 1935 (NLRA) that existed prior to 1947, under which mushroom workers were not considered to be agricultural laborers because mushroom production was classified as a horticultural activity. The trial court noted that while Congress expanded the definition of "agricultural" laborers in 1947 to include mushroom workers, the Pennsylvania legislature has not made such an amendment to the PLRA. In amending the NLRA, Congress borrowed the definition of "agriculture" found in the Fair Labor Standards Act of 1938 (FLSA), which defines "agriculture" as "the production, and cultivation, growing and harvesting of any agricultural or horticultural commodities." *See,* 29 U.S.C. § 203(f). However, the Pennsylvania General Assembly was unsuccessful in its attempt to modify the PLRA in 1969, and thus the court found that mushroom workers were protected by the PLRA. The court further rejected the employer's reliance on other Pennsylvania statutes that have interpreted "agricultural labor" to include mushroom workers, such as the Seasonal Farm Labor Act of 1978 and the unemployment compensation statute.

The Pennsylvania Supreme Court found that the lower court granted the proper deference owed to the PLRB in its own reasonable and long-standing interpretation of the statute and that it was inappropriate for the courts to follow a different interpretation until the General Assembly amends the PLRA.

The Comité de Trabajadores was represented by the Friends of Farmworkers, Inc., in Pennsylvania, and the AFL-CIO filed as *amicus curiae* on their behalf.

Vlasic Farms, Inc., v. Pennsylvania Labor Relations Board (PA Sup. Ct. July 25, 2001), No. 59 E.D. Appeal Dkt. 1999, 2001 Pa. LEXIS 1598.

OSC ANNOUNCES ANTIDISCRIMINATION GRANTS FOR 2001–02 – In its latest round of grant-making, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) has awarded to 11 nonprofit entities grants ranging from $50,000 to $90,000. The recipients are to use the funds to educate workers and employers so as to reduce citizenship-, national origin-, and document-based discrimination arising out of the legal requirement that all employers in the United States verify their employees' employment eligibility.

"Grants to faith- and community-based organizations enable us to educate workers and employers about their rights and responsibilities under the immigration laws," said John Tasviña, OSC special counsel. "Our grantees are known and respected in their communities and will work with OSC to provide assistance to employers to prevent discrimination and to workers to protect them from discrimination."

The OSC awarded grants to the following organizations: Asian Pacific American Legal Center (Los Angeles, CA), which will provide OSC-funded services in partnership with the Asian Law Caucus (San Francisco, CA); Catholic Charities of Dallas; Coalition for Humane Immigrant Rights of Los Angeles; Georgia Hispanic Chamber of Commerce (Atlanta, GA); Lutheran Social Services of Minnesota (Minneapolis, MN); National Immigration Law Center (Los Angeles, CA); Nebraska Appleseed Center for Law in the Public Interest (Lincoln, NE); New York Association for New Americans (New York NY); Northern California Coalition for Immigrant Rights (San Francisco, CA); United Farm Workers of America (locations throughout California); and Washington Alliance for Immigrant and Refugee Justice (Seattle, WA).

Immigrants & Welfare Update

ORR OUTLINES PROCEDURES FOR GRANTING BENEFITS ELIGIBILITY TO VICTIMS OF TRAFFICKING – The Office of Refugee Resettlement (ORR) has outlined procedures to be followed by benefits agencies in granting eligibility to victims of trafficking. Issued in May 2001, ORR State Letter #01-13 advises that state refugee coordinators, national voluntary agencies, and other interested parties abide by the agency's guidance until more formal procedures are developed.

Under the Victims of Trafficking and Violence Protection Act of 2000 (October 2000), victims of "severe forms of trafficking in persons" are eligible for federal benefits without regard to their immigration status. In addition, state programs that are funded or administered by federal agencies and federal programs whose funding is limited by appropriations must provide benefits to victims of trafficking "to the same extent" as to refugees. Victims of trafficking who are 18 years or older must be certified by the U.S. Department of Health and Human Services (HHS) in order to secure benefits.

According to the ORR, approximately 50,000 women and children and an unknown number of men are trafficked annually into the United States. "Severe forms of trafficking" include sex trafficking and the forced or fraudulent recruitment, harboring, transport, or provision of a person for labor or services that subject the person to involuntary servitude, peonage, debt bondage, or slavery. Sex trafficking is defined as involving a commercial sex act induced by force, fraud, or coercion, or any such act compelled of a minor. In order to deter these crimes and to ensure effective punishment of traffickers, the law provides increased law enforcement, protection, and assistance for victims (see "DOJ and State Dept. Issue Regulations Implementing Victims of Trafficking Law," p. 2).

Under the law, victims of trafficking may obtain a nonimmigrant ("T") visa permitting them to remain in the U.S. and to work if federal law enforcement officials determine that they are potential witnesses to trafficking. Three years after obtaining a T visa, these victims may become eligible to adjust to lawful permanent resident status. However, victims of trafficking who have been certified by the HHS (and those who are under 18 years old) may obtain benefits regardless of whether they have secured a T visa.

The HHS delegated to the ORR the authority to conduct, in consultation with the U.S. attorney general, benefit certifications. To receive certification, victims must being willing to assist in the investigation and prosecution of trafficking cases, and either (1) have made a bona fide application for a T visa, or (2) be a person whose continued presence in the U.S. the attorney general is ensuring to effectuate a trafficking prosecution. The ORR will issue certification letters to victims of trafficking who meet

these requirements. Children, who do not need to meet these criteria, can also obtain letters from the ORR stating that they are victims of severe forms of trafficking and are therefore eligible for benefits.

Victims of trafficking should be able to receive all federal benefits as long as they meet other program requirements, such as those relating to income level. The ORR clarified that victims of trafficking do *not* need to produce documentation of their immigration status in order to secure benefits. Benefit agencies should accept the original certification letter (or letter for children) in place of INS documentation. Agencies can call the "trafficking verification line" at the ORR to confirm the validity of the letter and should not contact the INS. The ORR reminds agencies that the INS Systematic Alien Verification for Entitlement (SAVE) system does not contain information about victims of trafficking.

The ORR notes that many victims of trafficking will not have standard identity documents, such as driver's licenses. It advises agencies not to deny benefits to such persons, but to call the trafficking verification line for assistance. Similarly, many victims will not have or be eligible for a Social Security number (SSN). The ORR reminds agencies that, where an SSN is required, they should assist individuals in obtaining non-work Social Security numbers and cannot deny benefits pending the issuance of an SSN. (See also ORR State Letter #00-23).

In benefit programs where an immigrant's entry date is relevant (e.g., refugee assistance), a trafficking victim's certification date is considered the "entry" date. At this time, the ORR plans to issue initial certification letters that are valid for eight months and to issue "follow-up" certification letters to persons who continue to meet the requirements. Benefit agencies may need to redetermine eligibility when the certification letters expire.

Until formal procedures are developed, ORR is issuing certification letters on a case-by-case basis. Agencies that encounter persons who may meet the definition in the Victims of Trafficking and Violence Protection Act should contact Michael Jewell at 202-401-4561 or Neil Kromash at 202-401-5702. Agencies should call Loren Bussert at 202-401-4732 regarding any children who may be victims of severe forms of trafficking in persons. They can also contact Lorna Grenadier, at the U.S. Dept. of Justice's Criminal Section of the Civil Rights Division at 202-616-3807.

ORR State Letter #01-13 is available on the internet at:
www.acf.dhhs.gov/programs/ofa/traffic/stateltr.htm

INTERIM FINAL SCHIP REGULATIONS ISSUED; TWO NEW PROVISIONS MAY JEOPARDIZE IMMIGRANTS' ACCESS – The new regulations for the State Children's Health Insurance Program (SCHIP) add two amendments which advocates believe will impede immigrant families' access to the program. One of the new provisions is based on an interpretation of the federal Privacy Act that could also threaten immigrants' ability to receive other public benefits and services. Issued on June 25, 2001, by the Centers for Medicare and Medicaid Services (CMS) (formerly the Health Care Financing Administration), the interim final regulations amend and supersede final regulations issued in January 2001, which were placed "on hold" by the incoming Bush administration.

The two amendments in the regulations that threaten immigrant children's and families' access to SCHIP and other benefit programs relate to Social Security numbers (SSNs) and language reporting. The first authorizes states to require applicants for SCHIP to provide SSNs. The second amendment deletes a requirement that states report on SCHIP recipients' primary language.

The interim final regulations also incorporate Medicaid rules that require agencies to assist applicants who do not yet have SSNs and prohibit agencies from delaying or denying benefits to otherwise eligible applicants whose SSN applications are pending. This is a positive clarification, but it does not compensate for the negative impact the other provisions will have on immigrant participation in SCHIP.

Requiring SSNs on SCHIP applications is likely to deter applications from immigrant families, who often fear that an application for benefits will trigger reporting to the Immigration and Naturalization Service or adversely affect family members' immigration status. The requirement imposes another kind of barrier for some qualified battered immigrants and Cuban/Haitian entrants who cannot obtain regular SSNs. These individuals also face long delays in securing nonwork SSNs.

The CMS's justification for letting states require SSNs departs from a longstanding interpretation of law embodied in the prior final regulations. With limited exceptions, courts have held that requiring SSNs on applications for benefits violates the Privacy Act, which prohibits federal, state, or local governments from requiring an SSN as a condition of eligibility for any program. The CMS's novel interpretation of the Privacy Act is based on one of the exceptions, which permits states to require SSNs in "general public assistance" programs. Despite numerous legal precedents confining the exception to state and county cash assistance programs, the CMS has announced its legal interpretation that SCHIP qualifies for the general public assistance exception. The CMS's interpretation may make the exception applicable to numerous programs long considered protected by the Privacy Act, threatening immigrants' access to many essential services.

Deleting the primary language reporting requirement also has an adverse effect on immigrant families. Persons with limited English proficiency often encounter difficulty learning about programs, completing applications, and obtaining services. Benefits agencies are required to provide meaningful access for limited English-proficient persons, but their compliance cannot be measured and monitored without data. The interim final regulations encourage states to collect their own data about the languages spoken by program enrollees. Such encouragement is not sufficient because it fails to establish minimum standards and limits advocates' ability to compare states to one another.

The interim final regulations took effect on Aug. 24, 2001. In states where the implementation of the new regulations requires contract changes, the state will not be required to comply until the next contract cycle. Immigrants' rights, health, and children's advocates from around the country worked collaboratively in developing and submitting comments to the CMS on the interim final regulations. Additional comments are needed, specifically "real life" accounts of the difficulties immigrants have had in obtaining SSNs and the effect of requests for SSNs in deterring immigrant participation in benefit programs. Send stories to Health Care Financing Administration, Dept. of Health and Human Ser-

vices, Attn. HCFA-2006-IFC, P.O. Box 8016, Baltimore, MD 21244-1850. Please send a copy to NILC, 3435 Wilshire Blvd, Suite 2850, Los Angeles, CA 90010, Attn. Gabrielle Lessard.

Advocates should also make efforts to monitor how their states are promoting access for persons with limited English proficiency and encourage their states to collect and make available data on recipients' primary language.

66 Fed. Reg. 33,810–22 (June 25, 2001).

"QUALIFIED" IMMIGRANTS REACHING END OF FIVE-YEAR BAR; SOME STATES YET TO PROVIDE FOR BENEFITS ELIGIBILITY – On Aug. 22, 2001, immigrants who obtained "qualified" immigrant status on or after the effective date of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) will begin reaching the end of the five-year bar. The PRWORA barred most qualified immigrants who entered the U.S. on or after Aug. 22, 1996, from receiving "federal means-tested public benefits" (i.e., Supplemental Security Income (SSI), food stamps, Temporary Assistance for Needy Families (TANF), State Children's Health Insurance Program (SCHIP), and non-emergency Medicaid) during the first five years after they secure qualified immigrant status. Immigrants face additional restrictions in eligibility for SSI and food stamps.

Advocates should ensure that state agencies are aware that post-Aug. 22, 1996, entrants who reach the end of the five-year bar may be eligible for federal Medicaid, TANF, and SCHIP benefits. Some states have not yet taken advantage of federal Medicaid and TANF funding to provide benefits for all eligible immigrants. Idaho, Indiana, Mississippi, South Carolina, and Texas provide TANF only to lawful permanent residents credited with 40 quarters of work, veterans and active duty military and their spouses and children, individuals granted status as a refugee, asylee, Amerasian immigrant, or Cuban/Haitian entrant, and persons granted withholding of removal or deportation. Idaho, Indiana, Mississippi, North Dakota, Texas, Virginia, and Wyoming provide Medicaid only to lawful permanent residents credited with 40 quarters of work, veterans and active duty military and their spouses and children, individuals granted status as a refugee, asylee, Amerasian immigrant, or Cuban/Haitian entrant, and persons granted withholding of removal or deportation. Idaho also provides Medicaid to qualified abused immigrants who have lived in the U.S. for five years, while Wyoming provides Medicaid to qualified abused immigrants and persons paroled into the U.S. regardless of their date of entry.

Advocates in these states should remind their legislatures that federal funding is available and encourage them to implement policies providing eligibility for post–Aug. 22, 1996, entrants.

TEXAS AG ISSUES OPINION THAT COUNTY HOSPITALS NOT ALLOWED TO SERVE "NOT QUALIFIED" IMMIGRANTS – An opinion by the state's attorney general has generated concern among Texas public hospitals providing primary and preventive medical services to undocumented persons. In the July 10, 2001, opinion, Attorney General John Cornyn concluded that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) precluded the Harris County hospital district from providing the medical services to undocumented persons unless the state's legislature explicitly authorized them. The PROWRA provision at issue required state legislatures to act, after Aug. 22, 1996, to affirm their intention to provide certain public benefits to "not qualified" immigrants.

Legal scholars have determined that the provision violates the Tenth Amendment to the U.S. Constitution, which reserves the power of self-governance to the states. Nonetheless, attorneys analyzing the situation in Texas have found that the legislature has complied with the PRWORA's requirements by affirming eligibility for medical services to unqualified immigrants. In 1997 the state amended relevant sections of a statute requiring county hospital districts to provide medical and hospital care for all indigent and needy persons residing in their districts.

Cornyn issued the opinion in response to a request from the Harris County attorney, who apparently made the request at the urging of a hospital district commissioner.

A state attorney general's opinion simply constitutes that attorney's advice to a public entity and is not binding on that client or any other party. The Harris County hospital district, like the majority of other Texas hospital districts, is continuing to serve residents of its area without regard to their immigration status. However, at least two other Texas county hospitals have stopped serving undocumented persons because of the attorney general's opinion. In addition, the opinion has inspired the Young Conservatives of Texas to charge that several of the state's county hospitals have misappropriated public funds in violation of state criminal statutes.

Although the issue has not come up in other states, Texas Democratic Congressman Gene Green has introduced a bill, H.R. 2635, which would clarify that state and local governments can provide primary and preventive care to not qualified immigrants without passing a new state law. The bill is currently with the House subcommittee on health.

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