



Immigration Issues

ADMINISTRATION PROPOSES INCLUDING INS AND EOIR IN NEW HOMELAND SECURITY DEPT. – The Bush administration has proposed the creation of a Cabinet-level Dept. of Homeland Security (DHS)

that would include the Immigration and Naturalization Service and the Executive Office for Immigration Review, as well as a great many other federal agencies. According to the administration, the proposal, if approved, would constitute the most extensive reorganization of the federal government since the creation in the 1940s of the Dept. of Defense and the National Security

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

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

Council. Initial Congressional reaction to the proposal has been supportive of the general concept of creating a Cabinet-level agency that prioritizes the fight against terrorism but critical of some of the specifics, and especially the inclusion of particular agencies with central missions distinct from counter-terrorism.

In an initial round of hearings, various House committees voted to remove a number of agencies from the DHS, including the Coast Guard, the Secret Service, the Federal Emergency Management Agency, and the service functions of the INS. Subsequently, the House Republican leadership agreed to support most of the administration's proposal and restore most agencies to the bill now being presented to the full House. However, the House leadership remained committed to leaving the services functions of the INS in the Justice Dept., while placing the enforcement and border protection functions of the INS in the new DHS. House Republican leaders also rejected an administration proposal, as part of the homeland security initiative, to impose federal standards for state drivers' licenses. At this issue's press time, the House is preparing for debate, with nearly 100 proposed amendments awaiting consideration.

In the Senate, Senator Lieberman, who had proposed the creation of a DHS before the administration decided to adopt the proposal, has introduced a bill as a Senate alternative to the administration's proposal. The Lieberman bill would keep all of the INS within the DHS, while dividing services and enforcement into two separate bureaus within a new directorate of immigration affairs. The EOIR would remain in the Dept. of Justice, while jurisdiction over the affairs of unaccompanied minor noncitizens would go to the Office of Refugee Resettlement of the Dept. of Health and Human Services.

The proposals to include part or all of the INS in the new DHS have placed the pre-existing proposals for INS reorganization in a new context. Many immigrant advocates are concerned that including immigration functions in the DHS will restrict immigration by causing it to be unduly seen as a national security issue. Advocates are also concerned that having immigration services handled in a separate department from immigration enforcement may cause services to receive even less attention and priority than they do now.

The administration is hoping to have agreement reached on the structure of the DHS before the congressional August recess and to have a bill enacted by Sept. 11. However, some legislators have expressed doubt that Congress will be able to meet this deadline, since once the House and Senate pass their respective bills, they will then have to reach a compromise in conference.

DOJ PROPOSES RULES TO MONITOR CERTAIN NONIMMIGRANTS –

Citing weaknesses in Immigration and Naturalization Service procedures that have resulted in the agency's failure to keep track of the whereabouts of nonimmigrants (i.e., non-U.S. citizens admitted to the United States for a specific purpose, and generally on a temporary basis), the U.S. Justice Dept. has issued proposed rules that would require nonimmigrants from designated countries, and other nonimmigrants designated by consular and immigration officials, to be registered, photographed, fingerprinted, and subjected to further monitoring.

The names of the countries whose nationals will be subject to the new rules will be posted in the Federal Register. In addition, nonimmigrants whom inspection officers at ports of entry or consular officers abroad determine pose potential security risks that require closer monitoring will be subject to the new rules.

Congress first authorized nonimmigrant registration requirements in the Immigration and Nationality Act of 1952. Though this law has been used only rarely, now is not the first time it has been invoked. For example, in 1979, during the crisis in which Iranians took over the U.S. embassy in Teheran and held members of the staff hostage, Iranian nationals who were in the U.S. as students were required to register with the government. In addition, since the 1990s the INS has imposed registration and reporting requirements on nonimmigrants from Iran, Iraq, Libya, and Sudan. The proposed rule would impose more comprehensive registration and monitoring requirements and extend these requirements to designated nonimmigrants from other countries.

In a press statement announcing the proposed registration and reporting requirements, the Justice Dept. characterized the measure as a strengthening of the "Entry-Exit Registration System." Section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) mandated the establishment of an automated entry/exit control system to track records of departure and identify nonimmigrants who overstayed their visas. However, legislation subsequently delayed implementation of that mandate. Both the USA PATRIOT and Border Security Acts include measures requiring the INS to develop a fully integrated data system that tracks the issuance of visas and the entry and exit of nonimmigrants.

To Whom Will the New Rules Apply? In consultation with the U.S. secretary of State, the attorney general will post a notice in the Federal Register designating certain countries as ones whose natives or citizens are subject to the new rules. Diplomats will be exempt from the new procedures, and the attorney general may designate other classes of nonimmigrants or individuals to be exempted as well.

Also subject to the registration rules will be:

- any nonimmigrant whom a consular or inspecting officer has reason to believe is a native or citizen of a country designated by the attorney general, and

- any nonimmigrant who meets certain criteria, or whom a consular officer or inspecting officer has reason to believe meets such criteria, indicating that the individual warrants monitoring due to the national security interests (as defined in INA section 219) or law enforcement interests of the U.S. The attorney general or secretary of State must determine what these criteria are.

In addition, the attorney general may require nonimmigrants from certain countries to register with the INS even if they have already been admitted to the U.S. or are already present here. The attorney general would announce such a requirement by publishing a notice in the Federal Register.

How Will the New Procedures Work? Any nonimmigrant subject to the new registration requirements who applies to be admitted to the U.S. would have to register and be fingerprinted and photographed at the port of entry. The INS would have to notify such individuals that if they remain in the U.S. for 30 days or more, they must present themselves at an INS office to provide

additional documentation confirming that they are complying with the requirements of their visa. They would have to report to an INS office within 30 to 40 days after the date they were admitted and confirm their residence and employment and/or enrollment in an approved school.

Nonimmigrants subject to the new procedures would be required to reregister annually and present evidence to confirm that they remained in compliance with the requirements of their visa. Individuals would be required to present themselves within 10 days of their original anniversary of admission to the U.S.

In addition, any nonimmigrant subject to the special registration who remained in the U.S. for 30 days or more would be required, within 10 days of changing his or her address or employment, or of enrolling in a different educational institution, to notify the INS of the change by mail. Currently, all nonimmigrants are required to notify the INS when they change their address. Under the proposed rule, nonimmigrants subject to special registration who fail to comply with registration requirements are considered to have violated their status.

An individual would be allowed to apply to the district director or other designated officer for relief from the requirements. The supplementary information to the proposed rule states that individuals might obtain relief upon showing that due to exigent or unusual circumstances they could not reasonably fulfill the requirements. However, the district director's decision regarding an application for relief would be final and could not be appealed.

Under the proposed rule, when a nonimmigrant leaves the U.S., he or she would be required to report to an INS departure control officer at the port of entry specified by the INS, in order to confirm the individual's departure. The INS is limiting the ports of entry through which nonimmigrants subject to special reporting requirements may depart the country because the agency needs to develop facilities at airports and other ports of entry to ensure departure control. A nonimmigrant who fails to comply with this requirement would be presumed to be inadmissible if he or she later sought to enter the U.S. Such a presumption could be overcome by a showing that the individual satisfied the registration requirements.

The supplementary information to the proposed rule states that, under INA section 266, a willful failure to register or the making of false statements upon registration is punishable by a fine of up to \$1,000 or imprisonment for up to 6 months. Providing a false statement would also subject the nonimmigrant to detention and removal.

The supplementary information also notes that immigrants as well as nonimmigrants in the U.S. are required to notify the INS of a change of address within 10 days of the change, and failure to comply with this requirement is punishable under INA section 266(b) by a fine of up to \$200 and imprisonment for 30 days. Persons guilty of these offenses are also subject to removal. The INS has not enforced this requirement for many years, nor has the agency publicized it. However, in a July 18, 2002, press release, the attorney general announced that the agency is issuing a proposed rule to provide clear notice of the requirement.

When he first announced the new procedures on June 6, Attorney General John Ashcroft stated that the government would enter the names of individuals who fail to comply with the regis-

tration requirements or who overstay their visas into the National Crime Information Center database. Persons whose names appear in that database may be detained by state and local law enforcement officers if the named persons are stopped for traffic violations or other reasons. On that occasion, Ashcroft said that he believes state and local law enforcement officers have inherent authority to enforce civil immigration laws, a position that is at odds with the policies of most state and local law enforcement agencies across the country.

67 Fed. Reg. 40,581-86 (Jun. 13, 2002).

AG EXTENDS SALVADORAN TPS ANOTHER 12 MONTHS; INS AUTOMATICALLY EXTENDS VALIDITY OF EADs – The Immigration and Naturalization Service has published notice in the Federal Register extending the attorney general's designation of El Salvador as a country whose nationals and residents currently in the United States qualify for temporary protected status (TPS) and automatically extending the validity of employment authorization documents (EADs) issued to Salvadorans with TPS to Mar. 9, 2003. The Salvadoran TPS designation, which had been due to expire on Sept. 9, 2002, will now be in effect until Sept. 9, 2003. The INS estimates that 263,000 persons applied for TPS under the original program and are eligible to benefit from the extension.

TPS is granted to persons from countries that are designated by the attorney general as experiencing armed conflict, environmental disaster, or certain other conditions that prevent those persons from returning. TPS allows individuals to remain and work in the U.S. during the period of TPS designation. The attorney general made the current TPS designation for El Salvador on Mar. 9, 2001, in the wake of a series of severe earthquakes that caused numerous fatalities and left 1.6 million people without adequate housing. The current notice notes that the attorney general decided to extend the TPS designation because conditions warranting this designation continue to exist.

To register for the one-year extension, nationals of El Salvador (as well as individuals with no nationality who last habitually resided in El Salvador) previously granted TPS must apply for it during the 60-day registration period that will begin on Sept. 9, 2002, and end on Nov. 12, 2002. Such persons need only file Form I-821, Application for Temporary Protected Status, without the filing fee, as well as Form I-765, Application for Employment Authorization and two identification photographs (1½" x 1½"). Applicants who seek work authorization under the extension must submit the \$120 filing fee or a fee waiver request with the Form I-765; those who do not need work authorization must still submit Form I-765, but without the fee. Applicants who previously registered for TPS and were fingerprinted do not need to be re-fingerprinted and do not need to submit the \$50 fingerprinting fee. Prior registrants who were not previously fingerprinted because they were under 15 years of age but who now must be fingerprinted must also pay this fee.

In order to benefit from the extension, individuals who applied for TPS under the current program but who have not yet received approval of their application still must apply for the extension within the 60-day registration period.

Late initial registration is also available under the extension.

In order to apply, an applicant must:

- be a national of El Salvador, or a person with no nationality who last habitually resided in El Salvador;
- have been continuously physically present in the U.S. since Mar. 9, 2001;
- have continuously resided in the U.S. since Feb. 13, 2001; and
- be admissible as an immigrant, except as otherwise provided under Immigration and Nationality Act section 244(c)(2)(A), and not ineligible under INA section 244(c)(2)(B).

Applicants for late initial registration must also be able to show that during the initial registration period, between Mar. 9, 2001, and Sept. 9, 2002, they:

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

The notice also announces the automatic extension of the employment authorization documents of Salvadorans who received EADS under the TPS program. The reason for this extension is that the INS recognizes that many reregistrants will not receive new EADs until after their current ones have expired, particularly since the initial registration period has not yet expired. The extension applies to Salvadorans who currently hold EADs that expire on Sept. 9, 2002, and have the notation "A-12" or "C-19" (under "Category" for Form I-766 EADs) or "274a.12(a)(12)" or "274a.12(c)(19)" (under "Provision of Law" for Form I-688B EADs). Such cards are automatically valid now until Mar. 9, 2003. But the individuals who benefit from this extension still must reregister for TPS between Sept. 9 and Nov. 12, 2002, in order to have employment authorization throughout the extended TPS period. 67 Fed. Reg. 46,000-03 (Jul. 11, 2002).

EOIR REGULATION AUTHORIZES PROTECTIVE ORDERS CLOSING IMMIGRATION HEARINGS – The Executive Office for Immigration Review has issued an interim rule that authorizes immigration judges in individual immigration proceedings to issue protective orders that prohibit disclosure of information used in those proceedings. Protective orders may be issued where the Immigration and Naturalization Service establishes a "substantial likelihood" that disclosure of information that is or will be submitted under seal would harm national security or law enforcement interests.

The rule allows the INS, in requesting a protective order, to file documents with the immigration court under seal, which means the documents may not be examined by the respondent. The rule also requires the IJ to give "appropriate deference" to "senior officials in law enforcement and national security agencies" in assessing whether the disclosure of information will harm national security or law enforcement.

Once a protective order is issued, information subject to the order may not be disclosed except to authorized persons, and the rule provides sanctions for unauthorized disclosure of such in-

formation. A respondent who violates a protective order, or whose attorney or accredited representative violates a protective order, is barred from receiving any discretionary relief, except for bond. This bar does not apply if the respondent shows that he or she is fully cooperating with the INS or other law enforcement agencies investigating the disclosure of information and establishes "by clear and convincing evidence" either (1) that "extraordinary and extremely unusual circumstances" exist, or (2) that the violation of the protective order was beyond the control of the respondent and his or her attorney or legal representative. Attorneys and accredited representatives who violate a protective order may also be suspended from practice before EOIR.

The rule took effect on May 21, 2002, one week before it was published in the Federal Register. In promulgating the rule without the advance public notice and opportunity for comment generally required by the Administrative Procedure Act, the agency relied upon the "good cause" exception to this APA requirement, asserting that protective orders are needed because disclosure of information could prejudice investigations arising out of the attacks of Sept. 11, 2001. Comments on the interim rule must be submitted on or before July 29, 2002.

67 Fed. Reg. 36,799-803 (May 28, 2002).

AG ISSUES FINAL RULE FOR ADJUSTMENT UNDER LIFE ACT LEGALIZATION, EXTENDS FILING DEADLINE TO JUNE 4, 2003 – The attorney general has issued a final rule governing adjustment of status under the "late legalization" provisions of the Legal Immigration Family Equity (LIFE) Act and the LIFE Act Amendments, and applications for Family Unity status under the LIFE Act. With some amendments, the final rule adopts the provisions of the June 1, 2001 interim rule (for a summary of the interim rule, see "Attorney General Issues Interim Rule Governing Applications for 'Late Legalization' Under the LIFE Act," IMMIGRANTS' RIGHTS UPDATE, June 29, 2001, p. 1). Most importantly, the final rule extends the filing deadline for applicants for adjustment under the LIFE Act to June 4, 2003.

Under the LIFE Act, in order to be eligible for legalization, individuals must have filed a written claim for class membership, prior to Oct. 1, 2000, in one of three lawsuits that challenged the Immigration and Naturalization Service's implementation of the 1986 legalization program. The three lawsuits are *Catholic Social Services, Inc. v. Meese*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (CSS); *League of United Latin American Citizens v. INS*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (LULAC); and *Zambrano v. INS*, vacated, 509 U.S. 918 (1993) (*Zambrano*). Individuals who applied for class membership and had their applications denied by the INS nonetheless may apply for LIFE legalization. To be eligible for LIFE legalization, applicants must also:

- have entered the U.S. prior to Jan. 1, 1982;
- have resided continuously in the U.S. in an unlawful status since that date through May 4, 1988;
- have been physically present in the U.S. during the period from Nov. 6, 1986, through May 4, 1988;
- be admissible to the U.S.;
- have no conviction for a felony or for three or more misde-

meanors committed in the U.S.; and

- demonstrate basic citizenship skills or be pursuing a recognized course of study to obtain basic citizenship skills.

Applicants need not be currently residing in the U.S., and eligible individuals residing outside the U.S. may apply for LIFE legalization.

The interim rule took effect on June 1, 2001, and established a filing deadline of May 31, 2002, for adjustment applications. Because the final rule makes a number of changes to the application and adjudication process and was not issued until after the close of the original filing period, the final rule extends the application deadline until June 4, 2003.

The final rule reduces the fee for the Form I-485 adjustment application for LIFE Act applicants from \$330 to \$255, which is the fee charged to other adjustment applicants. The INS based the \$330 fee of the interim rule on a draft fee review study that the agency subsequently re-evaluated, resulting in the fee for other adjustment applicants being set at \$255 (see "INS Issues Final Rule Raising Fees for Many Applications and Petitions," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2002, p. 7). The INS will send \$75 refunds to individuals who paid the \$330 fee. The supplementary information to the final rule states that the INS anticipates that all refunds will be delivered by Sept. 3, 2002, and individuals who have not received a refund by that date should contact Lorraine Juiffre at 802-872-6200, ext. 3035. The final rule also requires that applicants between the ages of 14 and 79, inclusive, pay the fingerprinting fee (which is now \$50) at the time that they apply. The interim rule had required this of individuals between the ages of 14 and 75, and the final rule brings this requirement into conformity with that for all other adjustment applicants.

The statute requires that applicants for LIFE legalization have filed a "written claim for class membership" in one of the three lawsuits listed above, and the interim rule lists various forms of evidence class members can use to show that they did this. 8 CFR § 245a.14. The final rule adds a definition of a "written claim for class membership" as one of the forms listed in 8 CFR section 245a.14. The final rule also adds two additional forms to section 245a.14: Form I-765, Application for Employment Authorization, and an application for a stay of removal. The rule also clarifies that where an individual filed a written claim for class membership, he or she is deemed to have also filed a claim for class membership on behalf of a spouse or child "as of the date the alien alleges that he or she attempted to file or was discouraged from filing an application for legalization during the original application period." This provision allows the spouse or child to file a separate LIFE Act legalization application.

Commentators noted a conflict between the interim rule and Form I-485 Supplement D, LIFE Legalization Supplement to Form I-485 Instructions, regarding submission of proof of citizenship skills. Whereas the interim rule required that proof that an applicant is satisfactorily pursuing a course of study to achieve basic citizenship skills be submitted with the application, the instructions allow such proof to be submitted at any time during the application process. The final rule adjusts the regulation to accord with the form's instructions. The final rule also clarifies that applicants qualify for the age exception to this requirement only if they are 65 years of age or older at the time that they file the

application for adjustment.

The interim rule required that applicants who needed to travel outside the U.S. apply for advance parole from the Missouri Service Center, and that such applications be adjudicated "pursuant to the standards prescribed in [INA section 212(d)(5)]." The final rule eliminates the reference to the standards of section 212(d)(5) because these are too restrictive. In addition, the final rule allows individuals to apply for advance parole at their local INS district office, if they submit evidence showing that their need to travel is due to urgent humanitarian reasons. LIFE legalization applicants who seek advance parole for other reasons must apply by mail to the Missouri Service Center.

The final rule modifies 8 CFR section 245a.18(d) to apply the "special rule" for determinations of whether the applicant is likely to become a public charge to all LIFE legalization cases. The special rule provides that an individual who has a consistent employment history is not inadmissible on the public charge ground even though he or she has income below the poverty level. The interim rule applied the special rule only where an applicant appeared inadmissible under the public charge ground of inadmissibility. The final rule also modifies the special rule to take into account the fact that an applicant "may not have consistent employment history due to the fact that an eligible alien was in an unlawful status and was not authorized to work."

The final rule also provides that, where the INS decides to deny a LIFE legalization application, the agency will send the applicant a notice of intent to deny and provide the individual a 30-day period in which to respond to the notice.

The final rule also provides that where the INS finds that an applicant has failed to establish eligibility to adjust under the LIFE Act, the INS will determine whether the individual has established eligibility for temporary residence under section 245A of the INA (the original legalization provision of the 1986 Immigration Control and Reform Act). This provision is intended to effectuate the congressional purpose in enacting the LIFE Act of bringing to an end the class action litigation challenging INS implementation of the IRCA legalization program. The INS notes that eligibility requirements for LIFE Act legalization are somewhat different than for section 245A temporary residence, and some applicants may qualify for legalization even though they do not qualify for LIFE Act legalization.

The final rule also addresses the LIFE Act Amendments Family Unity program. The supplementary information to the rule notes that the INS is currently drafting a separate rule that will implement section 1504(c) of the LIFE Act Amendments, which allows individuals to apply for Family Unity from outside the U.S.

Commentators urged the INS to grant Family Unity status in two-year increments rather than the one-year increments provided in the interim rule. The INS considers that granting employment authorization for a two-year period is inappropriate where the principal alien (the applicant for LIFE Act legalization) can obtain authorization only for one year. However, the final rule does provide that once the principal alien obtains lawful permanent resident status, Family Unity applicants can obtain Family Unity status in two-year increments.

The final rule took effect on June 4, 2002.

67 Fed. Reg. 38,341 (Jun. 4, 2002).

INS REVISES DEFINITION OF "UNLAWFUL PRESENCE" FOR PURPOSES OF THE 3- AND 10-YEAR BARS – The Immigration and Naturalization Service has modified the definition of "unlawful presence" that the agency uses for purposes of the 3- and 10-year bars to admission due to unlawful presence. The agency now considers that the time that a noncitizen spends in the United States in deferred action status does not count as time unlawfully present in the country.

Individuals whose adjustment of status applications are pending denial or were denied because they were considered to have accrued unlawful presence while in deferred action status may have their cases re-evaluated due to this policy change. In addition, the time that noncitizens spend in the country after applying for temporary protected status (TPS) or deferred enforced departure (DED) before these applications are adjudicated will not count towards unlawful presence as long as the applications are ultimately approved. The new policy is contained in a memo issued by INS Executive Associate Commissioner Johnny Williams.

Under section 212(a)(9)(B) of the Immigration and Nationality Act, noncitizens who were unlawfully present in the U.S. for a period longer than 180 days, who departed the U.S. before any removal proceedings were commenced against them, and who then seek admission to the country are inadmissible for a period of three years. Noncitizens who are unlawfully present for one year or more who leave the country and then seek admission are inadmissible for a ten-year period. The INS has not issued regulations concerning this statutory provision but instead has interpreted it in a series of memoranda (*see, e.g.*, "Unlawful Presence for Purposes of 3- and 10-Year Bars Tolted for Entire Time Nonimmigrants' Applications for Change of Status or Extension of Stay are Pending," IMMIGRANTS' RIGHTS UPDATE, Apr. 11, 2000, p. 5).

INS Memorandum "Unlawful Presence," HQADN 70/21.1.24-P (Jun. 12, 2002).

BIA RULES ON STANDARD FOR NON-LPR CANCELLATION – The Board of Immigration Appeals has issued an en banc precedent decision interpreting the hardship standard that applies to applications for cancellation of removal under section 240A(b) of the Immigration and Nationality Act. Section 240A(b) requires that applicants establish that they have been continuously physically present in the U.S. for at least 10 years, that they have good moral character, and that their removal would cause "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident parent, spouse, or child. The decision finds that the cancellation hardship standard requires a showing of harm that is less than "unconscionable." However, under the decision a respondent must establish that the qualifying relative would suffer hardships "substantially different from those that would normally be expected upon removal to a less developed country."

The respondent in this case, a Ms. Andazola-Rivas, is a Mexican national who entered the U.S. without inspection in 1985. She was placed in removal proceedings, and at her hearing in 2000 the immigration judge granted her application for cancellation of removal. Among the factors on which the IJ based his decision were the following: Andazola is a 30-year-old single mother of two U.S. citizen children who are 11 and 6 years old.

For the last four years she has worked for the same company, which provides health insurance for her family and a 401K retirement savings plan. She owns her own house, valued at \$69,000, as well as two vehicles, and she has about \$7,000 in savings. She has no relatives in Mexico who could help take care of her children, and all of her siblings, aunts, and uncles live in the U.S., albeit without status. The older child testified that she has a very close relationship with her grandmother. The family is active in their church, and Andazola helps out twice a month at her younger child's Head Start program. Andazola also testified that she has asthma and would not be able to work in the fields in Mexico, and that, because she has only a sixth grade education, she would not be able to get an office job or any job comparable to the one she has in the U.S. She also testified that her children would not be able to get a good education in Mexico.

Based on all of these factors, the IJ concluded that Andazola's removal would cause exceptional and extremely unusual hardship to her citizen children. The Immigration and Naturalization Service appealed this ruling, and the BIA has now sustained the appeal.

A majority of the BIA concluded that this case is controlled by its prior ruling in *Matter of Monreal*, 23 I. & N. Dec. 56 (BIA 2001). In *Monreal*, the BIA held that an applicant for cancellation under INA section 240A(b) must show that his or her removal would cause harm to qualifying relatives that is "substantially different from, or beyond, that which would normally be expected from the deportation of an alien with close family members here." *Id.* at 65. The respondent was a 34-year-old Mexican national with three U.S. citizen children, the oldest of whom was 12 years old. His parents were lawful permanent residents residing near him, but his wife was undocumented and had returned to Mexico at the time of the hearing. The BIA concluded that the harms faced by his relatives were not sufficient to meet the cancellation standard (for more on *Monreal*, see "BIA Issues Decisions Interpreting Hardship Standards in Suspension and Cancellation Cases," IMMIGRANTS' RIGHTS UPDATE, Jun. 29, 2001, p. 7).

Andazola contended that her case was completely distinguishable from *Monreal*, pointing to the fact that she is a single mother and the sole support of her children and that she has no relatives in Mexico to help her family there. She also contended that women in Mexico face discrimination in employment and that this would make it very difficult as a single mother to support her family.

The BIA majority rejected these contentions, noting that were this a suspension of deportation case they "might well grant relief" but that Andazola did not meet the higher standard for cancellation. The BIA also questioned Andazola's status as a single mother, pointing to testimony that indicated that the children's father may at times live with the family and sometimes contributes to their support. And the BIA concluded that although it is likely that Mexico will not provide the citizen children with an education equal to that which they might obtain in the U.S., Andazola had not shown that they "would be deprived of all schooling or of an opportunity to obtain any education."

Board Member Osuna filed a dissent that was joined by Members Schmidt, Villageliu, Gundelsberger, Rosenberg, Moscato, Brennan, and Espenosa. The dissent would find that, while it is a close case, the respondent established that her U.S. citizen chil-

dren would suffer exceptional and extremely unusual hardship were she removed to Mexico. The dissent criticized the majority's ruling on the grounds that it failed to adequately consider the individual facts presented by this case. Board Member Espenozo, joined by Member Rosenberg, filed a separate dissenting opinion, asserting that under the majority's reasoning, "it appears that no United States citizen child of a Mexican national will be able to demonstrate exceptional and extremely unusual hardship because he or she is deprived of educational opportunities or for financial reasons." Such a result is contrary to Congress's intent, in making the hardship inquiry in cancellation cases focus on the harm likely faced by the qualifying relatives.

In sustaining the appeal, the BIA denied cancellation and granted Andazola voluntary departure. She has filed a petition for review of the decision with the U.S. Court of Appeals for the Ninth Circuit.

Matter of Andazola-Rivas,
23 I. & N. Dec. 319, Int. Dec. 3467 (BIA Apr. 3, 2002).

BIA OVERRULES PRIOR DECISIONS TO FIND DUI CONVICTION NOT A CRIME OF VIOLENCE "AGGRAVATED FELONY" – The Board of Immigration Appeals has overruled prior decisions that found state offenses of driving under the influence (DUI) to be "crimes of violence" so as to constitute an "aggravated felony" if the defendant received a sentence of one year or more. The decision overrules *Matter of Puente*, Int. Dec. 3412 (BIA 1999) and *Matter of Magallanes*, Int. Dec. 3341 (BIA 1998).

In reversing its prior position, the BIA noted that a majority of the federal circuit courts of appeal that have considered the prior position have rejected it. Under the new ruling, the BIA will follow the law of the circuit in which a case arises. In circuits in which the federal court of appeals has not decided the issue, the BIA will consider a state DUI offense to constitute a "crime of violence" only if a conviction under the statute requires a level of criminal intent of at least "recklessness" and involves a substantial risk that the perpetrator may resort to the use of force to carry out the crime.

In the case before the BIA, the respondent, a Mr. Ramos, had been convicted of "operating" a vehicle while under the influence, in violation of Massachusetts law. Because it was a second conviction within a ten-year period, a sentence enhancement resulted in a two-year sentence of imprisonment. In removal proceedings, an immigration judge found that Ramos was deportable as an aggravated felon, and the BIA affirmed that decision. However, the BIA then granted Ramos's motion to reopen and concluded that, because "operating a vehicle" does not necessarily require the intentional act of "driving," a conviction under the Massachusetts statute encompasses a broad range of offenses and does not necessarily require that the defendant have committed an offense involving a substantial risk of the use of force. The BIA therefore found that this case was distinguishable from *Matter of Puente*, where the BIA had found that a felony DUI conviction constituted a "crime of violence" because the act of driving under the influence necessarily entailed a substantial risk of the use of force. Because the Massachusetts statute encompassed a broader range of offenses than just "driving," the BIA concluded that the INS had not established that

Ramos had committed a "crime of violence" such as to constitute an aggravated felony.

Subsequently, the INS filed a motion to reconsider the decision, submitting that additional information included in the judgment of conviction established that Ramos was in fact driving under the influence when he committed the offense. The INS contended that the case therefore was controlled by the BIA's prior decisions in *Matter of Puente* and *Matter of Magallanes*.

In denying the INS's motion, the BIA overruled *Puente* and *Magallanes*, noting that most circuits that have considered the issue have rejected the contention that a crime requiring only negligence, or with no intent requirement at all, can be considered a "crime of violence," although the circuits differ as to whether "recklessness" without more is sufficient to establish a "crime of violence" (for further discussion of circuit court cases on this issue, see e.g., "Three Circuit Courts Rule Felony DUI Conviction Not 'Aggravated Felony,'" IMMIGRANTS' RIGHTS UPDATE, Aug. 31, 2001, p. 12). In circuits that have ruled on this issue, the BIA will now follow the law of the circuit. In circuits in which the federal court of appeals has not decided the issue, the BIA will consider a state DUI offense to constitute a "crime of violence" only if a conviction under the statute requires a level of criminal intent of at least "recklessness."

Matter of Ramos, 23 I. & N. Dec. 336,
Int. Dec. 3468 (BIA Apr. 4, 2002).

IMMIGRANT STUDENT BILL PASSES SENATE JUDICIARY COMMITTEE – The Senate Judiciary Committee has passed a bill that would expand some undocumented immigrants' access to educational benefits and ability to adjust to lawful status. Sponsored by Sen. Orrin Hatch (R-UT), the Development, Relief, and Education for Alien Minors (DREAM) Act (S. 1291) was passed by the Senate committee on June 20, 2002. Before approving the DREAM Act, the committee made important changes in the bill, adding, with the support of Sen. Hatch, a substitute amendment proposed by Sen. Richard Durbin (D-IL). As a result, the bill was passed out of committee with strong bipartisan support, which bodes well for its eventual passage by the full Senate.

As amended in the committee, the DREAM Act repeals the provision of federal law that discourages states from providing in-state tuition to undocumented immigrants. It also permits long-time resident immigrants with good moral character to obtain lawful permanent resident status once they graduate from high school. In addition to the sponsorship of Sens. Hatch and Durbin, the amended DREAM Act now enjoys the cosponsorship of, among others, Sens. Ted Kennedy (D-MA) and Sam Brownback (R-KS) who are, respectively, the chair and ranking minority members of the Senate Immigration Subcommittee.

The committee session engendered more back and forth among the senators than usual, but in the end the amended bill passed by a voice vote. Sens. Maria Cantwell (D-WA), Durbin, and Hatch all spoke movingly about young people in their states from whom they had heard and who would benefit from the DREAM Act. Other senators voicing their support included Joseph Biden (D-DE), Dianne Feinstein (D-CA), and Patrick Leahy (D-VT), the chair of the committee.

All of these senators pointed out that the young people who would benefit from the DREAM Act have grown up in the country and can make significant contributions to U.S. society if freed to do so. They also emphasized that the states where these young people live should not be blocked by federal law from providing them with an education.

Sens. Jon Kyl (R-AZ) and Jeff Sessions (R-AL) spoke in opposition to the amended bill. They argued that it would reward lawbreakers, provide an incentive for more immigrants to come to the country illegally, and permit young people who had committed drug crimes and vandalism to legalize their status.

Theoretically, the next step towards passage of the DREAM Act would be Senate floor consideration. But there is very little floor time left before the end of this session of Congress. Advocates will have to build momentum for the bill if they hope to enact the DREAM Act before Congress adjourns in October 2002.

DOJ ISSUES PROPOSED REGULATIONS FOR ADJUSTMENT OF INDOCHINESE PAROLEES

– The U.S. Dept. of Justice has issued proposed regulations implementing a provision of the Foreign Operations Appropriations Act of 2001 that authorizes the attorney general to adjust the status of certain Indochinese parolees to lawful permanent residence. The three-year application period does not begin until the regulations are finalized.

Eligibility. Natives of Vietnam, Cambodia, and Laos may adjust their status to lawful permanent residence if they:

- were inspected and paroled into the U.S. before Oct. 1, 1997, from the Orderly Departure Program in Vietnam, a refugee camp in East Asia, or a displaced person camp administered by the United Nations High Commissioner for Refugees in Thailand;
- were physically present in the U.S. prior to and on Oct. 1, 1997;
- file an adjustment application within the three-year application period; and
- are otherwise admissible to the U.S.—however, some grounds of inadmissibility do not apply to these applicants, and certain other grounds may be waived.

The spouses and children of persons who adjust under this section are not entitled to derivative adjustment.

Grounds of Inadmissibility. Several grounds of inadmissibility—including those involving public charge, unlawful presence, and previous removal—do not apply to adjustment applications filed under this law. The attorney general may waive certain other grounds of inadmissibility—including those relating to health, misrepresentation, and document fraud—to prevent extreme hardship to the applicant or to his or her U.S. citizen or lawful permanent resident spouse, parent, son, or daughter. Applicants may also apply for any other waiver of inadmissibility available under section 212 of the Immigration and Nationality Act, including a section 212(h) waiver of certain criminal grounds.

Application Procedure. All applications under this law must be submitted to the Nebraska Service Center for adjudication by the Immigration and Naturalization Service. Immigration judges and the Board of Immigration Appeals do not have the authority to decide these applications. Persons who have filed an application with the INS and are in immigration court proceedings may seek

the consent of INS counsel to filing a joint motion for administrative closure. Applicants with a final order of removal, deportation, or exclusion may seek a stay of removal from the INS while their applications are pending.

Cap. Because the law limits the total number of adjustments to 5,000, the INS will assign a number to every application that is properly filed and adjudicate cases in the order in which they are submitted. In cases that require waivers to overcome any criminal, fraud, immigration violator, citizenship ineligibility, or illegal voting ground of ineligibility, the INS will assign a number only if and when the waiver is granted.

Written comments on the proposed regulations must be submitted to INS on or before Sept. 9, 2002.

67 Fed. Reg. 4,402–10 (July 9, 2002).

DOJ ISSUES PROPOSED REGULATION CHANGING STANDARD FOR OBTAINING WAIVER OF CRIMINAL GROUNDS OF INADMISSIBILITY

– In a little noticed move that could affect thousands of non-U.S. citizens applying for admission to the U.S. or adjustment of status to lawful permanent residents of the U.S., the Dept. of Justice has issued a proposed regulation that dramatically limits the circumstances under which the Immigration and Naturalization Service grants waivers of the criminal grounds of inadmissibility.

In an extension of his decision in *Matter of Jean*, 23 I. & N. Dec. 373 (A.G. May 2, 2002), the U.S. attorney general proposes a general rule that the INS will deny waivers of inadmissibility involving violent or dangerous crimes except in extraordinary circumstances. (For more information, see “AG Overrules BIA to Limits Its Authority to Give Relief to Noncitizens Who Committed Violent Crimes,” IMMIGRANTS' RIGHTS UPDATE, May 30, 2002, p. 4). Extraordinary circumstances include cases in which there are overriding national security or foreign policy considerations or the applicant has demonstrated that a denial would result in exceptional and extremely unusual hardship. Depending on the gravity of the crime, such circumstances may not be sufficient to warrant the grant of a waiver.

Written comments on the proposed regulation must be submitted to the INS on or before Sept. 9, 2002.

67 Fed. Reg. 4,402–10 (July 9, 2002)

BIA RULES “CONTINUOUS PHYSICAL PRESENCE” FOR PURPOSES OF NON-LPR CANCELLATION IS TERMINATED BY A VOLUNTARY DEPARTURE

– The Board of Immigration Appeals has issued an en banc precedent decision finding that a voluntary departure “under threat of deportation” ends the accrual of “continuous physical presence” that non-lawful permanent resident applicants for cancellation of removal must show to qualify for the relief. Under section 240A(b) of the Immigration and Nationality Act, applicants for cancellation must establish that they have been continuously physically present in the United States for at least ten years. They must also show that they have good moral character and that their removal would cause exceptional and extremely unusual hardship to a U.S. citizen or LPR parent, spouse, or child.

The respondent in this case, a Mr. Romalez-Alcaide, is a Mexican national who entered the U.S. in 1984. On two occasions, in

1993 and 1994, he accepted voluntary departure to avoid having deportation proceedings initiated against him. In both cases, he returned to the U.S. within a day or two of the departure. In 1997 the Immigration and Naturalization Service served Romalez-Alcaide with a Notice to Appear, initiating removal proceedings. At his hearing, Romalez-Alcaide applied for cancellation of removal and voluntary departure. The immigration judge found that he was not eligible for cancellation because he met neither the ten-year continuous physical presence nor the hardship requirement. The IJ granted the request for voluntary departure, and Romalez-Alcaide appealed the denial of cancellation.

On appeal, the BIA noted that whether the respondent satisfied the ten-year requirement depends upon whether his voluntary departures ended his accrual of continuous physical presence. The respondent contended that under INA section 240A(d)(2), which sets forth rules for calculating continuous physical presence for purposes of cancellation, his brief departures should not be considered to interrupt continuous physical presence. Section 240A(d)(2) provides that an applicant is considered to have failed to maintain continuous physical presence if he or she departs the country "for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days."

However, a majority of the BIA concluded that continuous physical presence for purposes of cancellation can be ended by departures of shorter duration than those described in section 240A(d)(2). The BIA noted that under the "brief, casual, and innocent" standard that is used to determine whether a departure ends continuous physical presence in suspension of deportation cases, a voluntary departure under threat of deportation of any length is considered to break continuous presence. The majority could find nothing in the legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which created removal proceedings, to explain why Congress did not include the "brief, casual, and innocent" standard for cancellation of removal. Nonetheless, it concluded that Congress must have intended for voluntary departures under threat of deportation to break continuous physical presence.

The majority also based its ruling on the regulations issued by the attorney general to implement "special rule" cancellation under the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA). Available to certain Salvadorans, Guatemalans, and nationals of the former Soviet bloc, special rule cancellation is a form of relief that provides for more generous eligibility standards than regular cancellation of removal. The NACARA regulations provide that, in addition to departures longer than 90 days or in the aggregate longer than 180 days, departures under threat of deportation break continuous physical presence. 8 C.F.R. § 240.64(d). The majority reasoned that, since the attorney general considered such absences (i.e., resulting from departure under threat of deportation and lasting less than 90 days) to break continuous physical presence for purposes of a more generous form of cancellation, the restriction must also apply to regular cancellation of removal. The BIA therefore denied the appeal.

Board Member Pauley issued a concurrence, stating that as a BIA member he is constrained to follow the attorney general's regulations but that the regulations appear to conflict with the statute. Board Member Rosenberg, joined by Member Espenozo,

issued a dissent. They argued that the NACARA regulations for special rule cancellation of removal do not apply to this case, and that the statute sets forth an objective standard for measuring whether departures break continuous physical presence.

Because Romalez-Alcaide did not meet the continuous physical presence requirement, the BIA did not reach the issue of his appeal regarding the hardship requirement for cancellation.

Matter of Romalez-Alcaide, 23 I. & N. Dec. 423, Int. Dec. 3475 (BIA May 29, 2002).

BIA: RESIDENCE IN U.S. FOLLOWING ADMISSION AS NONIMMIGRANT COUNTS TOWARDS 7-YEAR "CONTINUOUS RESIDENCE" REQUIREMENT FOR LPR CANCELLATION – The Board of Immigration Appeals has

issued a precedent decision finding that applicants for cancellation of removal can have time spent in the United States following admission as a nonimmigrant apply to the "continuous residence" requirement. Under section 240A(a) of the Immigration and Nationality Act, cancellation applicants must show that they have accumulated seven years of continuous residence in the U.S. In addition to seven years of continuous residence, applicants must have been in lawful permanent resident status for at least five years.

The respondent in this case, a Mr. Blancas-Lara, is a Mexican national who entered the U.S. on a border crossing card in 1986, when he was five years old. In 1991 he adjusted to LPR status. In 1998 he was served with a Notice to Appear (NTA), commencing removal proceedings. At the time he was served with the NTA, ending the accrual of continuous residence for cancellation purposes, he had been an LPR for about six years and eight months.

At his hearing, Blancas-Lara applied for cancellation of removal. The immigration judge found that he satisfied the seven-year continuous residence requirement by counting the time Blancas-Lara lived in the U.S. before obtaining LPR status. The IJ justified this finding by reasoning that Blancas-Lara was at that time a minor living with his U.S. citizen father, and the U.S. residence of his father could be imputed to Blancas-Lara. The IJ concluded that Blancas-Lara was eligible for cancellation and found that he merited the relief in the exercise of discretion. The Immigration and Naturalization Service appealed this decision, raising only the claim that the IJ erred in finding that Blancas-Lara satisfied the continuous residence requirement. The INS did not otherwise contest Blancas-Lara's eligibility for cancellation or the grant of relief in the exercise of discretion.

On appeal, the BIA found that the plain language of the statute supports counting time spent in the U.S. following admission as a nonimmigrant towards the continuous residence requirement. INA section 240A(a)(2) requires applicants for cancellation to show seven years' continuous residence "after having been admitted in any status." The reference to "any status," the BIA held, must include nonimmigrant as well as immigrant status. The BIA also noted that under INA section 101(a)(33) "residence" is defined as a person's "principal, actual dwelling place in fact, without regard to intent."

The BIA rejected the INS's contention that Congress could not have intended to count time following admission as a nonimmigrant toward continuous residence, because that would en-

courage nonimmigrants to violate the terms of their status and establish residence in the U.S. The BIA noted that had Congress intended to require maintenance of status as a condition for cancellation, it could easily have made the requirement explicit in the statute.

Because the BIA concluded that Blancas-Lara's residence in the U.S. following his admission on a border crossing card met the seven-year requirement, it did not address the issue of whether the residence of his father could be imputed to him.

Matter of Blancas-Lara, 23 I. & N. Dec. 458, Int. Dec. 3477 (BIA Jun. 10, 2002).

BIA: MISDEMEANOR OFFENSE OF SEXUAL ABUSE OF A MINOR IS "AGGRAVATED FELONY" – The Board of Immigration Appeals has issued an en banc precedent decision finding that a New York misdemeanor conviction for sexual abuse of a minor constitutes an "aggravated felony" under section 101(a)(48)(A) of the Immigration and Nationality Act. The BIA had reached the opposite conclusion in *Matter of Crammond*, 23 I. & N. Dec. 9 (BIA 2001). However, the BIA subsequently vacated the opinion in *Crammond*, finding that it had no jurisdiction over Crammond's motion to reopen. The lack of jurisdiction stemmed from the fact that, unbeknownst to the BIA, the respondent had already left the country at the time of the original ruling. *Matter of Crammond*, 23 I. & N. Dec. 179 (BIA 2001).

In its original opinion in *Crammond*, the BIA majority found that, because there is no indication in INA section 101(a)(48)(A) that the provision applies to a misdemeanor conviction, only a felony conviction can constitute an "aggravated felony" under this subsection. The BIA now has decided that "the legal landscape relating to this question has significantly changed." At the time of the original *Crammond* decision, only the Seventh Circuit had ruled on the issue, finding that section 101(a)(48)(A) does encompass misdemeanors. *Guerrero-Perez v. INS*, 242 F.3d 727 (7th Cir. 2001). Since then, the Seventh Circuit has reaffirmed its prior ruling, and the Sixth and Eleventh Circuits have reached the same conclusion. The BIA concluded that these developments constitute grounds for reversing its ruling on this issue.

Matter of Small, 23 I. & N. Dec. 448, Int. Dec. 3476 (BIA June 4, 2002).

PRESIDENT DESIGNATES PERIOD OF ARMED CONFLICT FOR PURPOSES OF NATURALIZATION – President George W. Bush has designated Sept. 11, 2001, as the beginning of a period of armed conflict between the United States and a hostile foreign force, for purposes of naturalization under Section 329 of the Immigration and Nationality Act.

Under section 329, noncitizens who have served honorably in the U.S. armed forces during a designated period of military hostility may apply for and obtain naturalization without meeting certain of the normal requirements. For example, such individuals do not need to meet the normal residence and physical presence requirements. Individuals eligible for naturalization under this special provision may naturalize even if they are in deportation proceedings or subject to a final order of deportation.

The designation was announced in an executive order published in the Federal Register. According to the order, the termination date of the period will be announced in a future executive order, but don't expect this to happen before the next presidential election.

67 Fed. Reg. 45,287 (Jul. 8, 2002).

INS ASKS ASYLEES WHO APPLIED FOR ADJUSTMENT PRIOR TO JUNE 10, 1998, AND HAVE NOT RECEIVED A DECISION TO CONTACT THE AGENCY

– The Immigration and Naturalization Service is requesting that asylees who applied for adjustment of status on or before June 9, 1998, and still have not received a decision on their applications call the agency. The purpose of the call is to ensure that the INS has the applicant's current address and to check on the status of the case. The request was issued in a May 10, 2001, notice from the agency.

The notice directs applicants to contact the INS by calling 1-800-375-5283. When calling, the applicant should have available the application receipt number. When the phone is answered with an automated message, the applicant should press 1 ("for information about pending applications") and then 2 ("for change of address of your N-400 and certain pending asylum adjustment applications").

The notice also contains a special notice to Iraqi and Syrian asylees. Because of special laws, certain Iraqi and Syrian asylees are not subject to the 10,000 cases-per-year cap that applies to other asylee adjustment cases. The notice asks Iraqi and Syrian asylees who believe that the INS may be inadvertently treating their cases as being subject to the cap to write to the agency at the following address:

Nebraska Service Center
Attn: 485 Syrian Supervisor
P.O. Box 87333
Lincoln, NE 68501-7333

Litigation

SUPREME COURT TO DECIDE LEGALITY OF INS MANDATORY DETENTION

– The United States Supreme Court has decided to review a case challenging section 236(c) of the Immigration and Nationality Act, which requires detention without bond for non-U.S. citizens in removal proceedings who have been convicted of specified criminal offenses. In the decision below, *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002), the Court of Appeals for the Ninth Circuit had ruled that the detention without a hearing of a lawful permanent resident pursuant to section 236(c) violates due process (for more concerning the Ninth Circuit's decision in *Kim*, see "3d and 9th Circuits Hold Mandatory Detention Provision Unconstitutional," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2002, p. 12). The Supreme Court's decision to grant the solicitor general's petition for certiorari in the case means that the Court will decide this issue in the coming term, which begins in October.

Demore, District Director, INS v. Kim, No. 01-1491, 2002 U.S. LEXIS 4914 (Jun. 28, 2002).

SUPREME COURT STAYS INJUNCTION OF CLOSED IMMIGRATION HEARINGS – The United States Supreme Court has issued a stay of a lower court order that prohibited the Executive Office for Immigration Review from closing removal cases to the public in “special interest” cases pursuant to a directive of Chief Immigration Judge Michael Creppy (for more on the Creppy directive, see “Chief Immigration Judge Issues Guidelines for Secret Removal Hearings,” IMMIGRANTS’ RIGHTS UPDATE, Dec. 20, 2001, p. 3). The case below was brought by media organizations in New Jersey. The U.S. district court ruled that the blanket closing of hearings pursuant to the Creppy directive, without individualized determinations that national security interests warranted the closing of particular hearings, violates the First Amendment right of free speech, and issued an injunction. The government appealed the ruling to the Third Circuit Court of Appeals, but the appellate court denied the government’s request for a stay of the order pending consideration of the appeal. The government then sought a stay from the Supreme Court, and the Court has now stayed the order pending the final disposition of the government’s appeal of the case to the Third Circuit.

Ashcroft v. North Jersey Media Group,
No. 01A991 (Jun. 28, 2002).

9TH CIRCUIT RULES THAT HEIGHTENED INJUNCTION STANDARD NOT APPLICABLE TO STAY PENDING COURT’S REVIEW OF HABEAS DENIAL – The U.S. Court of Appeals for the Ninth Circuit has ruled that section 242(f)(2) of the Immigration and Nationality Act, which prohibits courts from enjoining the removal of noncitizens unless they meet an extremely high standard, does not apply to the court’s ability to issue a stay of removal pending its review of the appeal of a denial of a habeas corpus petition. Section 242(f)(2) restricts the power of courts to “enjoin the removal of any alien pursuant to a final order . . . unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.” The court found that the issue of whether section 242(f)(2) applies to a request for a stay of removal is governed by its prior decision in *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (en banc). In *Andreiu*, the court found that section 242(f)(2) does not apply to the court’s determination whether to issue a stay of removal pending the review of a removal order pursuant to a petition for review, distinguishing a “stay” from an “injunction” for this purpose (for more concerning the decision in *Andreiu*, see “9th Circuit Holds That IIRIRA Did Not Modify the Standard for a Stay of Removal,” IMMIGRANTS’ RIGHTS UPDATE, Aug. 31, 2001, p.11).

Maharaj v. Ashcroft, No. 01-15703 (9th Cir. Jul. 2, 2002).

11TH CIRCUIT FINDS HEIGHTENED INJUNCTION STANDARD APPLIES TO STAYS OF REMOVAL PENDING DIRECT JUDICIAL REVIEW – A three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit has ruled that section 242(f)(2) of the Immigration and Nationality Act requires that a heightened standard be met before the court can issue a stay of removal pending consideration of a petition for review of a removal order. Section 242(f)(2) restricts the power of courts to “enjoin the removal of any alien pursuant to a final

order . . . unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.” The court refused to follow the decisions of the Ninth and Sixth Circuits, which have found that section 242(f)(2) does not apply to temporary stays pending judicial review of removal orders. *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir. 2001) (en banc); *Beijani v. INS*, 271 F.3d 670 (6th Cir. 2001). Instead, the court found that section 242(f)(2) applies to stay applications. The court concluded that, under this standard, “only aliens who can show clear-cut errors under established law will receive stays.”

Weng v. U.S. Attorney General, 287 F.3d 1335 (11th Cir. 2002).

9TH CIRCUIT RULES THAT A SENTENCE ENHANCEMENT FOR RECIDIVISM DOES NOT COUNT TOWARDS THE ONE-YEAR SENTENCE REQUIREMENT FOR AN “AGGRAVATED FELONY” THEFT CONVICTION – The United States Court of Appeals for the Ninth Circuit has issued an *en banc* decision finding that a defendant who was convicted of petty theft and sentenced to two years’ incarceration as a result of an enhancement due to a prior conviction was not convicted of an “aggravated felony.”

The ruling finds that the California statute under which the defendant was convicted is not a “theft” offense under section 101(a)(43)(G) of the Immigration and Nationality Act because the statute criminalizes conduct that would not constitute “theft” under the “generic” definition of the term. In addition, the defendant cannot be considered to have received a sentence of one year or longer for the offense, because the statute only authorizes imprisonment for a maximum of six months. While the defendant actually received a two-year sentence, that was due to an enhancement of the sentence because of a prior offense. The court found that the enhancement cannot be counted towards the sentence for this offense. The ruling was made in a criminal case where the issue was whether the prior offense was an aggravated felony so as to trigger an enhancement of the defendant’s sentence for illegal entry to the U.S. following deportation.

The defendant in this case, a Mr. Corona-Sanchez, is a Mexican national who first entered the U.S. in 1987 or 1988, at the age of 13. He subsequently collected a series of criminal convictions for various offenses. The offense at issue in this case involved his attempt to shoplift a 12-pack of beer and a pack of cigarettes from a liquor store in 1994. He was convicted, and, because of a previous conviction for attempted petty larceny of a liquor store, he was sentenced for petty theft with a prior conviction.

In 1997 Corona-Sanchez pled guilty to being found in the U.S. after having been deported. The district court that heard his case found that his prior petty theft offense constituted an “aggravated felony” under INA section 101(a)(43)(G) and imposed a 77-month sentence under federal sentencing guidelines. The instant case arises on appeal from that decision.

In reviewing the decision, the court of appeals first addressed the issue of what methodology to use to define the term “theft offense” as used in INA section 101(a)(43)(G). In this case, because the crime of “theft” developed from the common law crime of “larceny,” the court found this common law definition to be the starting point, but not the end point, in the analysis. Rather, the

common law definition must be considered in conjunction with statutory history of the term, to arrive at a "generic concept" of the term. The court noted that in *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court rejected both placing sole reliance on the common law definition and relying on the specific definition used by a state, in determining whether a state crime meets a federal criminal definition. Instead, the court followed the approach of the Seventh Circuit in *Hernandez-Mancilla v. INS*, 246 F.3d 1002 (7th Cir. 2001), where the court arrived at a "modern, generic definition" of a "theft offense" based on both the common law and subsequent statutory usage. Under this definition, a theft offense is "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." 246 F.3d at 1009.

The court then sought to determine whether the offense under which Corona-Sanchez was convicted comes within this definition. Because the record in this case nowhere reflects the specific California statute under which Corona-Sanchez was convicted of petty theft, the court of appeals had to undertake an extensive examination of California law in order to identify the statute. Ultimately, based on the description of the offense in the presentence report and the general structure of California theft statutes, the court concluded that Corona-Sanchez must have been convicted under California Penal Code section 484(a). Examining this provision, the court found that it is significantly broader than the federal common law definition of a "theft" offense. A defendant can be convicted under section 484(a) without having taken or exercised control over the property in question. Aiding and abetting a theft violates section 484(a) even if not specifically charged. And offenses not encompassed in the federal definition, such as theft of labor and solicitation of false credit reporting, are also encompassed within section 484(a). Although Corona-Sanchez received a sentence enhancement for "Petty Theft with Prior Jail Term for a Specific Offense," neither the underlying conviction nor the enhancement narrow the scope of the conviction to necessarily come within the generic definition of a "theft" offense. For this reason, the court concluded that the conviction cannot be considered an aggravated felony under INA section 101(a)(43)(G).

In addition, the Ninth Circuit found that the conviction is not encompassed within the definition of INA section 101(a)(43)(G) for another independent reason: it does not carry a sentence of incarceration for at least one year. While it is true that Corona-Sanchez was sentenced to two years' incarceration, that sentence was only the result of an enhancement for a prior offense. The court concluded that such an enhancement does not relate to the commission of the offense at issue and does not alter the elements of that offense. Because the offense at issue carries a maximum sentence of only six months, the court concluded that the conviction cannot be considered an aggravated felony. The court therefore remanded the case to the district court for resentencing consistent with its opinion.

U.S. v. Corona-Sanchez, No. 98-50452
(9th Cir. Jun. 6, 2002) (*en banc*).

9TH CIRCUIT FINDS AEDPA RESTRICTIONS ON 212(c) RELIEF APPLY TO LPR WITH PRE-AEDPA CONVICTION AFTER TRIAL – A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit has issued a ruling that narrows eligibility for lawful permanent residents (LPRs) seeking waivers under section 212(c) of the Immigration and Nationality Act in several significant ways. First, the decision finds that the Supreme Court's ruling in *INS v. St. Cyr*, 533 U.S. 289 (2001), applies only to convictions resulting from guilty pleas and not to those resulting from trials. In *St. Cyr*, the Court found that the provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) that barred 212(c) relief for individuals convicted of a wide variety of specified criminal offenses does not apply to guilty pleas entered prior to the statute's enactment. Second, the decision finds that, while the AEDPA does not apply to individuals whose deportation cases commenced prior to the enactment of the statute, it does apply to an individual who was issued and served an Order to Show Cause (OSC) prior to the AEDPA but whose OSC was not filed with the immigration court until after the AEDPA's enactment. The AEDPA was enacted on Apr. 24, 1996.

The respondent in this case, a Mr. Armendariz-Montoya, is a Mexican national who entered the United States in 1972 when he was three years old. In 1978, he adjusted to LPR status. In 1995 he was convicted, after a jury trial, of possession of cocaine with intent to distribute. While he was incarcerated, the Immigration and Naturalization Service issued a detainer against him. On Apr. 5, 1996, the INS issued an OSC against him, charging him with being deportable based on the conviction. On Apr. 22, 1996, the INS served the OSC on Armendariz, and on Dec. 19, 1996, the INS filed the OSC with the immigration court.

At Armendariz's deportation hearing in April 1997, the immigration judge found that he was ineligible for a 212(c) waiver because of the AEDPA, and Armendariz appealed. The Board of Immigration Appeals affirmed the IJ's decision, and Armendariz then filed a petition for review. The court of appeals dismissed the petition for lack of jurisdiction, and Armendariz then filed a habeas petition with the district court. The district court found that the AEDPA does not apply to Armendariz because he was served with an OSC two days prior to the enactment of the statute. The INS appealed that ruling, and the Ninth Circuit has now ruled on that appeal.

On the issue of whether deportation proceedings had commenced at the time of the AEDPA's enactment, the court concluded that they had not, because the OSC was not filed with the immigration court until afterwards. The court found this issue to be controlled by its prior decision in *Cortez-Felipe v. INS*, 245 F.3d 1054 (9th Cir. 2001) (finding that for purposes of determining the applicability of provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), deportation cases commence with the filing of an OSC), and by the applicable regulations. 8 CFR § 3.14(a). The court rejected the reasoning of the First Circuit in *Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999), noting that the court there reached the opposite result in a case presenting "materially identical circumstances to this case." In *Wallace*, the First Circuit found that for purposes of the AEDPA's bar to 212(c) relief, the INS need only have served the OSC on the respondent before the AEDPA was enacted to establish that de-

portation proceedings had already commenced. The First Circuit refused to defer to the regulation on this issue, noting that “we are not concerned with the INS's internal time tables, starting points, due dates, and the like, but with the judicial question of retroactivity . . . [which] turns on . . . the realities of reasonable reliance or settled expectations on the part of litigants.”

The court also rejected the reasoning of the Eleventh Circuit in *Alanis-Bustamante v. Reno*, 201 F.3d 1303 (11th Cir. 2000). In that case, the court found that the combination of service of an OSC with the lodging of an INS detainer against the respondent was sufficient to commence proceedings against a respondent “for purposes of determining the applicable law.” Again, the Ninth Circuit rejected this reasoning on the basis of the regulation and the *Cortez* case.

The court summarily rejected the contention that applying the AEDPA's restrictions to the pre-AEDPA conviction in this case would be impermissibly retroactive. The court distinguished the conviction in this case from the one at issue in *St. Cyr* on the grounds that in this case the conviction resulted from a trial rather than a guilty plea. The court reasoned that “unlike aliens who pleaded guilty, aliens who elected a jury trial cannot plausibly claim that they would have acted any differently if they had known about [the AEDPA restriction on 212(c) relief].” The court did not appear to seriously examine whether trial strategy could be influenced by reasonable expectations regarding whether deportation would result from a conviction.

The court also rejected the claim that the AEDPA restriction on 212(c) relief violates equal protection by eliminating the relief for LPRs in deportation proceedings but not for those in exclusion proceedings. The court found this issue resolved by its previous decision in *United States v. Estrada-Torres*, 179 F.3d 776 (9th Cir. 1999), *overruled on other grounds*, *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (*en banc*).

The petitioner has filed a petition for rehearing of the decision.

Armendariz-Montoya v. Sonchik, No. 01-16029
(9th Cir. May 30, 2002).

9TH CIRCUIT ISSUES GENERAL ORDER RE: ISSUING STAYS IN PETITIONS FOR REVIEW – The U.S. Court of Appeals for the Ninth Circuit has issued a general order establishing the procedures that the court will follow in adjudicating requests for stays of deportation or removal filed in conjunction with petitions for review of deportation or removal orders. The order essentially codifies the procedure that the court established in *DeLeon v. INS*, 115 F.3d 643 (9th Cir. 1997).

Under the order, the filing of a motion or request for a stay of removal or deportation results in a temporary stay pending further order of the court. This stay occurs automatically, and the court ordinarily will not issue an order confirming the stay. A briefing schedule on the merits of the petition will not be established until the court has resolved the stay request. If the court on reviewing the request finds that it does not address the merits of the petition or the potential harms faced by the petitioner, the court will notify the petitioner and give him or her 14 days to submit a supplemental motion. The INS is given 42 days from the filing of the motion or stay request in which to file a response,

and the agency must submit the administrative record at the same time. The petitioner may file a reply brief within 7 days of service of the INS's response.

Ninth Circuit General Order 6.4.c. (effective July 1, 2002).

Employment Issues

FEDERAL AGENCIES CLARIFY LIMITED IMPACT OF *HOFFMAN PLASTIC DECISION*

– The U.S. Equal Employment Opportunity Commission (EEOC) and the Dept. of Labor (DOL) recently issued guidance clarifying the impact of the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 122 S. Ct. 1275 (2002). In *Hoffman*, the Supreme Court ruled that undocumented workers are not eligible for back pay under the National Labor Relations Act (NLRA). Consequently, immigrants' rights advocates have been concerned about the impact of *Hoffman* on the employment rights of immigrants under other federal laws.

On June 28, 2002, the EEOC announced its unanimous decision to rescind its 1999 Guidance on “Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws” in light of the *Hoffman* decision. However, the EEOC also reaffirmed its commitment to protecting undocumented workers and reiterated that *Hoffman* does not call into question the settled principle that undocumented workers are covered by federal statutes prohibiting employment discrimination. Such laws include Title VII of the Civil Rights Act, which the EEOC is charged with enforcing. Title VII prohibits national origin discrimination and sexual harassment as well as other forms of unlawful employment discrimination.

Moreover, “[The] EEOC will not, on its own initiative, inquire into a worker's immigration status. Nor will EEOC consider an individual's immigration status when examining the underlying merits of a charge.” The EEOC directed its field offices that claims for all forms of relief—except for reinstatement and back pay for periods after discharge or failure to hire—should be processed in accordance with existing standards regardless of an individual's immigration status. The EEOC is still evaluating the impact of *Hoffman* on the monetary remedies available to undocumented workers under federal employment discrimination statutes.

The DOL's clarification came in the form of a fact sheet explaining that the Supreme Court's decision in *Hoffman* is limited to back pay under the NLRA. The agency has stated that it will continue to enforce, under the Fair Labor Standards Act (FLSA), the rights of all workers—regardless of immigration status—to be compensated for work already performed. In addition, the DOL stated that *Hoffman* did not affect the rights of undocumented workers under the Migrant and Seasonal Agricultural Worker Protection Act (also known as AWPA), which requires employers and farm labor contractors to pay the wages owed to migrant or seasonal agricultural workers when the payments are due. However, the DOL is still evaluating how *Hoffman* affects other laws, such as the antiretaliation provisions of the FLSA.

The EEOC's guidance, "Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws," Number 915.002 (June 27, 2002), can be found at www.eeoc.gov/docs/undoc-rescind.html. The DOL's guidance, "Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* decision on laws enforced by the Wage and Hour Division," Fact Sheet #48, can be found at www.dol.gov/esa/regs/compliance/whd/whdfs48.htm.

COURT DENIES DESIGNER DONNA KARAN'S REQUEST FOR DISCOVERY INTO IMMIGRATION STATUS – A federal court in New York has denied the request made by defendant Donna Karan International, Inc., requesting discovery into the immigration status of plaintiffs in an unpaid wages case filed pursuant to the Fair Labor Standards Act.

Karan argued that, based on the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275 (2002), defendants were entitled to information regarding the immigration status of each of the plaintiffs in order to preserve a factual record on the issue. Karan suggested that defendants might be willing to enter into a confidential agreement restricting the disclosure of any information obtained in the discovery process. However, the court held that it was unclear *Hoffman* even applied, since the case before it involves unpaid wages for work already performed. *Hoffmann* concerned post-termination back pay for work not actually performed but awarded as compensation under the National Labor Relations Act for a worker's unlawful firing.

The court held that even if such discovery were relevant, the risk that it would result in intimidation and possibly destroy the underlying claims outweighed the defendants' need for the disclosure of such information.

Zeng Liu, et al. v. Donna Karan International, Inc., et al., 00 Civ. 4221 (WK), 2002 U.S. Dist. LEXIS 10542 (June 11, 2002).

Immigrants & Welfare Update

SENATE FINANCE COMMITTEE VOTES TO INCLUDE RESTORATIONS OF BENEFITS TO IMMIGRANTS IN TANF BILL – The drive to restore public benefits to immigrants took one more step forward when the Senate Finance Committee voted to include important immigrant health and welfare restorations in the bill reauthorizing the Temporary Assistance for Needy Families (TANF) program. With the committee's vote on June 26, 2002, the Work, Opportunity, and Responsibility for Kids (WORK) Act of 2002 (H.R. 4737) will now proceed to the Senate floor. Congress is required to reauthorize the federal welfare legislation before October 2002, when the new fiscal year begins. The House version of H.R. 4737, which passed on May 16, 2002, contained no immigrant-specific improvements.

The final Senate Finance Committee bill includes:

- a state option to provide Medicaid and the State Children's Health Insurance Program (SCHIP) to lawfully residing pregnant women and children, regardless of when they entered the U.S.

(these provisions are identical to the Immigrant Children's Health Improvement Act (ICHIA — S. 582, H.R. 1143));

- a clarification that state and local governments may use their own money to provide health services to undocumented immigrants; and

- a state option to provide TANF to qualified immigrants regardless of the date they entered the U.S.

Under current law, most lawfully residing immigrants who entered the U.S. on or after the date on which the federal welfare law passed—Aug. 22, 1996—are barred from receiving Medicaid and SCHIP during their first five years in the country. States may provide comparable health assistance using their own money, but they cannot obtain any federal reimbursement if they do so.

A bipartisan group in Congress has been toiling for years to permit immigrant children and pregnant women to obtain basic care under these federal health care programs, regardless of the date they entered the U.S. Passage of such legislation, including the ICHIA, has remained a high priority for health and immigrant rights advocates since the 1996 welfare law's immigrant restrictions were first enacted. The ICHIA would allow states to lift the five-year bar and provide health services to lawfully residing pregnant women and children under federal Medicaid and SCHIP. In states that elect this option, the ICHIA also would eliminate sponsor deeming and liability for these women and children.

Sen. Bob Graham (D-FLA) proposed that the ICHIA provisions be incorporated into the Senate's TANF bill (H.R. 4737). The committee debated the Graham amendment for over an hour but finally voted by a 12-9 margin to include the ICHIA in H.R. 4737. Sens. Olympia Snowe (R-ME) and Frank Murkowski (R-AK) joined all Democrats except Chairman Max Baucus (D-MT) in voting for the Graham amendment. Unfortunately, given the nature of that debate, it is possible that amendments to weaken or eliminate the ICHIA will be offered when the bill is considered by the full Senate.

State and Local Health Care. Another significant amendment to H.R. 4737 adopted by the Senate Finance Committee would clarify that states and local governments are free to provide health services with their own funds without checking immigration status. Their ability to do so has been called into question by some state officials' interpretations of section 411 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).

The state and local health care amendment was introduced by Sen. Jeff Bingaman (D-NM), who argued that state and local governments should not be hindered in their ability to provide broad, population-focused public health services to their residents. Sen. Bingaman called attention to two egregious cases—a man's death and a two-year-old child's emergency surgery—that resulted from the University of New Mexico's current policy of denying nonemergency care to certain immigrants. The Bingaman amendment was adopted by a 13-8 vote, with Sen. Jon Kyl (R-AZ) joining the same group of committee members who had supported Sen. Graham's ICHIA amendment.

TANF Restoration. The welfare reauthorization bill passed by the Finance Committee also gives states the option to provide

TANF to qualified immigrants regardless of the date they entered the U.S. Under current law, qualified immigrants who entered the country on or after Aug. 22, 1996, are barred for five years from receiving federal TANF services, including child care, transportation subsidies, and English as a second language (ESL) classes. The provision allowing states to eliminate this restriction was included in the version of H.R. 4737 introduced by Sen. Baucus and was not amended by the Finance Committee.

The fight to restore core benefits to these vulnerable populations has been long and arduous, and it would not have been possible without the hard work and perseverance of immigrant rights, anti-poverty, health, and faith-based groups around the country.

Final passage of these provisions, however, is not guaranteed. The TANF reauthorization bill will likely go to the Senate floor in September. Senators with a history of voting to restrict immigrants' access to benefits may try to alter or remove these hard-won provisions at that time.

NATIONAL POLL SHOWS VOTER SUPPORT FOR IMMIGRANT BENEFIT RESTORATIONS

— A national telephone poll of likely U.S. voters showed that a substantial majority support the restoration of public benefits denied to immigrants under the 1996 welfare law. Of the people polled, 67 percent agreed that lawfully present immigrants should have the same access to benefits as U.S. citizens. This number increased to 79 percent when respondents were reminded that immigrants are required to pay taxes.

When broken down along party, regional, and racial/ethnic lines, support for the statements remained consistently high. Seventy-one percent of Republicans, 74 percent of Democrats, and 76 percent of Independents expressed support for the statements. Broken up by region, support was found among 74 percent of respondents in the South, 73 percent of respondents in the Northeast, 73 percent in the West, and 72 percent in the Midwest. By race, 73 percent of whites, 70 percent of African-Americans, and 75 percent of Hispanics expressed support.

Substantial majorities of voters also expressed support for immigrants' access to specific key benefits. Eighty-five percent supported giving "lawfully present immigrants who are working the same access that U.S. citizens have to work supports like help with child care, job training, as well as help learning English." Seventy-nine percent supported providing "all legal immigrant children the same access that citizen children have to Medicaid and other health care services." And 79 percent of respondents supported allowing "legal immigrants who are working and paying taxes access to the same safety net as U.S. citizens, including Medicaid, food stamps and SSI [Supplemental Security Income] disability."

Voters also supported aid to immigrants in certain circumstances, regardless of their immigration status. Seventy-nine percent supported the provision of prenatal care by the government regardless of the mother's immigration status, and 80 percent agreed that the government should "make sure that immigrant victims of domestic violence have access to needed public

benefits." Seventy-nine percent agreed that immigrant children should have the same access as citizen children to Medicaid and other health care services.

These results demonstrate that voters oppose the restrictions on immigrant eligibility for public benefits imposed by the 1996 welfare law. The voters' support for reinstating immigrant access to safety net services should inform Congress as it completes its work on reauthorization of the Temporary Assistance for Needy Families (TANF) program.

The poll, conducted by Lake, Snell, Perry and Associates, surveyed 1,000 likely voters between May 15 and May 22, 2002. Telephone numbers for the survey were drawn from a random digit dial sample. Additional detail on the poll results is posted on NILC's web site at www.nilc.org.

MOST STATE PROPOSALS TO RESTRICT DRIVERS' LICENSES FOR IMMIGRANTS HAVE BEEN UNSUCCESSFUL

— During the 2001–02 state legislative sessions, approximately 61 bills were introduced that addressed immigrants' ability to obtain drivers' licenses. Fifteen of the proposals sought to expand immigrants' access to drivers' licenses and 46 bills sought to restrict access. As of July 2002, two states have enacted expansive proposals and six states enacted restrictive proposals.

Before the events of Sept. 11, 2001, campaigns to expand immigrants' access to drivers' licenses were gaining momentum in at least 15 states. Campaigns were conducted by highway safety organizations, immigrants' rights advocates, labor, law enforcement, and religious organizations, among others. Advocates sought to allow alternative identifiers to the Social Security number (SSN), expand the list of immigration documents used to prove identity, and remove existing restrictive requirements. Because of reports that some of the Sept. 11 terrorists were able to obtain drivers' licenses, most campaigns were stalled after the attacks. Nevertheless, expansive proposals in New Mexico and South Carolina passed and were signed into law. New Mexico's law repeals the requirement that applicants must have an SSN, and South Carolina's law expands the categories of immigrants who are now eligible for a license. Campaigns in many other states have continued, and advocates plan to introduce new bills next year.

Of the 46 restrictive bills introduced, 38 bills failed and only six states enacted bills into law: Colorado, Florida, Kentucky, New Jersey, Ohio, and Virginia. Colorado codified an existing requirement that applicants for a license must be lawfully present in the country; Florida, Kentucky, New Jersey, and Ohio tied the expiration of an immigrant's license to his or her immigration document; and Virginia required noncitizens to submit fingerprints with their license application and authorized the state police and driver's license agency to share information with federal agencies. Ohio also authorized the registrar to implement "security features" on noncitizens' licenses. Due to the work of advocates at the state level, the restrictive proposals that passed were greatly improved before they were signed into law. Among the restrictive proposals that failed to pass was a Tennessee bill that sought to repeal

a law passed last year. That law expanded immigrant eligibility by permitting state residents to submit an affidavit if not eligible for an SSN. For a complete list of all state proposals and their status, see the NILC website at www.nilc.org.

DOJ PUBLISHES FINAL GUIDANCE ON PROVIDING LEP PERSONS ACCESS TO SERVICES

– The U.S. Dept. of Justice (DOJ) has published its final guidance to recipients of federal funds on providing limited English-proficient (LEP) persons access to programs and services. Released on June 18, 2002, the guidance was followed by a letter dated July 8 from Assistant Attorney General Ralph Boyd, instructing other federal agencies to use the DOJ's final guidance as a uniform standard in developing their guidance to recipients on access for LEP persons.

The guidance advises local police departments, court systems, correctional facilities, and other recipients of DOJ funding on the actions they should take to provide LEP persons with meaningful access to their activities and programs. The DOJ's guidance was published pursuant to Executive Order 13166 (E.O. 13166), which clarifies the requirements of Title VI of the Civil Rights Act. Title VI prohibits recipients of federal funds from discriminating on the basis of race, color, or national origin. (E.O. 13166 is published at 65 Fed. Reg. 50,121–22 (Aug. 16, 2000).)

The executive order required federal agencies that provide federal financial assistance to develop guidance for funding recipients on providing meaningful access to LEP persons. The order also required the agencies to develop internal plans for providing LEP persons meaningful access to services and programs conducted by the agencies themselves.

On Oct. 26, 2001, the DOJ issued a clarifying memorandum on E.O. 13166 (see "Justice Dept. Confirms Validity of Clinton's Order Regarding Access to Services for Limited English-Proficient Persons," IMMIGRANTS' RIGHTS UPDATE, Nov. 16, 2001, p. 14). The memorandum included a four-part analysis that federal funding recipients must use in determining the level of language assistance they are required to provide under Title VI. The DOJ directed federal funds-granting agencies that had published guidance documents to review them with respect to the four-factor test, modify them as indicated, and republish their guidance for public comment. Agencies that had not previously published guidance to their recipients were required to develop guidance and publish it for public comment.

The DOJ published its final guidance following public comment. As with the intermediary versions, the final guidance is framed by the four factors that the DOJ outlined in its October 2001 clarifying memo:

1. the number or proportion of eligible LEP persons eligible to be served or likely to be encountered by the funding recipient;
2. the frequency with which LEP individuals come into contact with the recipient's programs;
3. the nature and importance of the program, activity, or service provided by the program to people's lives; and
4. the resources available to the recipient and costs of providing language assistance.

The guidance notes that many of the 24 parties that submitted comments during the public comment period advocated for two additional requirements: they urged that recipients be required to have a written LEP plan and that the use of informal interpreters, such as family members and fellow inmates, be prohibited in some circumstances. The DOJ declined to require a written plan or prohibit the use of informal interpreters in any context. However, the guidance has been revised to include a clarification that the use of informal interpreters should not be part of any recipient's LEP plan. It also advises recipients that they "should generally offer competent interpreter services free of cost to the LEP person" where language services are necessary.

The final guidance notes the DOJ's unique responsibility for ensuring consistency among the other agencies' guidance documents. The July 8 letter from Assistant Attorney General Boyd represents a step in the implementation of that responsibility. As noted above, the letter instructs agencies to revise their guidance to be consistent with the final DOJ guidance and states that the DOJ expects to receive draft guidance from other agencies no later than July 29, 2002. Other agencies' guidance documents will require DOJ approval prior to their publication for public comment. Existing guidance will remain in effect until the conformed guidance documents become final.

The DOJ's letter demands a high level of consistency with its guidance. The letter states that other agencies are expected to focus their modifications on the examples provided in the final guidance, rather than the guidance's substantive provisions. Agencies are required to highlight and provide a written justification for any departures from the DOJ's guidance.

The letter also instructs agencies to revise or update their internal plans for ensuring LEP individuals' access to federally conducted programs and services and encourages agencies to become involved with the federal interagency work group on language access, described at www.lep.gov.

"Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons," 67 Fed. Reg. 41,455 (June 18, 2002); letter from Assistant Attorney General Ralph Boyd to Heads of Federal Agencies, General Counsels and Civil Rights Directors, July 8, 2002.

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