NATIONAL IMMIGRATION LAW CENTER

Immigrants' Rights Update

Volume 13 | Issue 3 | May 28, 1999

Immigration Issues

RULE ESTABLISHES PROCEDURES FOR SUSPENSION AND SPECIAL RULE CANCELLATION APPLICATIONS UNDER NACARA – The Immigration and Naturalization Service has issued an interim rule establishing procedures for handling applications for suspension of deportation and cancellation of removal for eligible nationals of El Salvador, Guatemala, and former Soviet Bloc countries under the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA).

The INS issued a proposed rule regarding NACARA suspension and cancellation on Nov. 24, 1998, and received over 400 comments in response (see "Proposed Regulations Issued For NACARA Suspension and Special Rule Cancellation Cases," IMMIGRANTS' RIGHTS UPDATE, Dec. 21, 1998, p. 1). The interim rule contains important changes made in response to comments to the proposed rule. Most significantly, the interim rule establishes a streamlined procedure for processing cases of applicants who are members of the class in *American Baptist Churches v. Thornburgh*, 760 F.2d 796 (N.D.Cal. 1991) *(ABC)*, affording them a rebuttable presumption that they meet the "extreme hardship" requirement for suspension or special rule cancellation. The interim rule takes effect June 21, 1999.

EXTREME HARDSHIP PRESUMPTION

The INS declined to accept the proposal made by many commentators that the agency recognize a presumption that all NACARA applicants meet the statute's "extreme hardship" requirement. Instead, the INS decided to give such a presumption only to applicants who are *ABC* class members. The agency decided that "the ABC class shares certain characteristics that give rise to a strong likelihood that an ABC class member or

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qualified relative would suffer extreme hardship if the class member were deported." These characteristics include the fact that *ABC* class members came to the United States on or before 1990, during a period of civil strife in El Salvador and Guatemala. They were entitled to special asylum adjudication procedures as a result of a settlement of litigation that alleged discriminatory treatment of Guatemalan and Salvadoran asylum applicants. And, for a number of reasons, these special adjudications were postponed for a lengthy period of time.

To be eligible for the hardship presumption, individuals must not have been convicted of an aggravated felony, and they must be included within one of the following categories:

1. Salvadorans who were present in the U.S. as of Sep. 19, 1990, and who applied for temporary protected status (TPS) or registered for benefits under *ABC* prior to Oct. 31, 1991, and were not "apprehended at the time of entry after Dec. 19, 1990"

2. Guatemalans who were present in the U.S. as of Oct. 1, 1990, and who registered for benefits under *ABC* prior to Dec. 31, 1991, and were not "apprehended at time of entry after Dec. 19, 1990"

3. Salvadorans or Guatemalans who filed an application for asylum with the INS on or before Apr. 1, 1990, or who filed an asylum application with the immigration court and served a copy on the INS on or before that date

Essentially, all Salvadorans and Guatemalans who are eligible for benefits under the NACARA as principals receive the presumption of hardship, while those who are eligible only as dependents of principals do not. Nationals of former Soviet Bloc countries who are eligible for NACARA relief do not receive the hardship presumption.

The interim rule's presumption of hardship for *ABC* class members is rebuttable. To receive the presumption, the applicant must answer a series of "yes/no" questions on the I-881 application form regarding extreme hardship. However, the applicant is not required initially to submit documentary evidence to support these answers. The INS asylum officer is then to evaluate the application to determine "whether, given the presumption, the application contains evidence of factors associated with extreme hardship." These factors are listed in the regulation, as noted below. The supplementary information to the rule notes that the absence of one or more factors is not enough to overcome the presumption, and generally the presumption will be overcome only in two circumstances: (1) where there is *no* evidence of factors associated with extreme hardship; or (2) where there is evidence in the record that could significantly undermine the presumption of extreme hardship. As an example of such undermining evidence, the information notes that an applicant who "has acquired significant resources or property in his or her home country may be able to return without experiencing extreme hardship," absent other hardship factors. In seeking to overcome the hardship presumption, the INS has the burden of proving that it is more likely than not that neither the applicant nor a qualifying relative would suffer extreme hardship.

The hardship factors identified in the interim rule as relevant in evaluating whether deportation would result in extreme hardship to an applicant or to his or her qualified relative, are the following:

1. The age of the alien, both at the time of entry to the U.S. and at the time of applying for suspension

2. The age, number, and immigration status of the applicant's children and their ability to speak the native language and adjust to life in another country

3. The health condition of the alien or the alien's child, spouse, or parent, and the availability of any required medical treatment in the country to which the alien would be returned

4. The alien's ability to obtain employment in the country to which the alien would be returned

5. The length of residence in the U.S

6. The existence of other family members who will be legally residing in the U.S

7. The financial impact of the alien's departure

8. The impact of a disruption of educational opportunities.

9. The psychological impact of the alien's deportation or removal

10. The current political and economic conditions in the country to which the alien would be returned

11. Family and other ties to the country to which the alien would be returned

12. Contributions to and ties to a community in the U.S., including the degree of integration into American society

13. Immigration history, including authorized residence in the U.S

14. The availability of other means of adjusting to permanent resident status

The rule also includes a number of other factors that may apply in addition to, or instead of, the above factors for cases where the applicant seeks suspension or cancellation as an abused spouse, child, the parent of an abused child, or the child of an abused parent. (These provisions relate to suspension or cancellation applications filed under the Violence Against Women Act of 1994 (VAWA), for individuals who were battered or subjected to extreme cruelty by a U.S. citizen or permanent resident spouse or parent.) The INS agreed to include in the interim rule the same hardship factors for VAWA suspension and cancellation cases that the agency has used in determining the existence of "extreme hardship" in VAWA self-petition adjustment cases.

ELIGIBILITY ISSUES

In the interim rule, the INS has abandoned its position that the statute's provision making eligible Salvadorans and Guatemalans who "filed an application for asylum with the [INS] prior to Apr. 1, 1990" excludes individuals who filed asylum applications only with the immigration court prior to that date. The INS now agrees with commentators that individuals who filed applications with the immigration court necessarily also served copies on the INS, and that individuals who filed either with the INS or the immigration court prior to Apr. 1, 1990, should be considered eligible for relief under the NACARA. In addition, the interim rule provides that any dependent spouse or child who was present in the U.S. and included in the principal's application at the time it was filed will be considered to have filed an application for asylum on that date. Dependents who are added to an application after it is initially filed will be considered to have filed on the date that they were added to the application.

The INS also has revised its interpretation concerning the eligibility for relief of individuals who were in deportation proceedings and then left the country pursuant to a grant of ad-

vance parole. The supplemental information to the proposed rule stated that such individuals would be subject to exclusion proceedings on their return to the U.S. and therefore would no longer be "deportable" and ineligible for suspension of deportation. In the supplementary information to the interim rule, the INS notes that a small number of *ABC* class members whose deportation proceedings were administratively closed under the settlement left the country with advance parole and subsequently returned. The INS has decided to treat these individuals' departure from the country as automatically terminating their deportation proceedings as of the date of their departure. If they were not actually placed in exclusion proceedings prior to Apr. 1, 1997, they may apply for special rule cancellation under the NACARA, and if the INS denies them relief, they will be placed in removal proceedings. While the INS believes that the only NACARA-eligible individuals in this situation are *ABC* class members, the interim rule allows asylum officers to follow this same procedure for any other individuals in this situation who are entitled to apply for NACARA relief from the INS.

For the small number of individuals in this situation who may have been placed in exclusion proceedings prior to Apr. 1, 1997, the INS takes the position that they are not eligible for NACARA relief. The agency recognizes that they could become eligible should the INS agree to terminate the exclusion proceedings and initiate removal proceedings. However, the agency has not decided to do so at this time.

Some commentators proposed that the agency continue to treat as dependent "children" persons who became 21 years old between the date of NACARA's enactment and the effective date of the regulations, because there were no procedures in place for them to apply for NACARA benefits before they "aged out." (Under the statute, unmarried sons and daughters over the age of 21 at the time their parent is granted NACARA relief, unlike "children," must also establish that they entered the U.S. on or before Oct. 1, 1990.) The INS declined to accept this proposal on the grounds that it would exceed the agency's statutory authority. However, the INS noted that it has previously issued advisories stating that NACARA-eligible individuals with dependents who may soon age-out could request expedited asylum adjudications.

ABSENCES AND CONTINUOUS PHYSICAL PRESENCE

In the proposed rule, the INS proposed two different standards for considering absences from the country as not interrupting continuous physical presence for purposes of suspension of deportation and special rule cancellation of removal. Absences for suspension purposes would be evaluated to determine whether they were "brief, casual, and innocent." Absences for special rule cancellation would also have to meet this standard, but in addition, could not exceed 90 days' duration for any one absence, or 180 days of total cumulative absences. The interim rule essentially establishes a uniform rule for considering absences for both suspension and special rule cancellation.

Under the interim rule, a "brief" absence is defined as a single absence of 90 days or less, or a cumulative total of absences of 180 days or less. For absences shorter than these, the applicant still must show that the absence was "casual and innocent" in nature, for purposes of both suspension and cancellation.

JURISDICTION AND APPLICATION PROCEDURE

The interim rule retains the jurisdictional structure of the proposed rule, under which applicants who have asylum cases pending at an INS asylum office will have their NACARA suspension or cancellation applications adjudicated by the INS, while applicants with cases pending before the immigration court or Board of Immigration Appeals, as well as those who have never filed an asylum case, generally must have their NACARA cases adjudicated by the immigration court. There are two exceptions to this division of jurisdiction: (1) registered *ABC* class members whose deportation proceedings were administratively closed or continued, including individuals who filed and were granted NACARA motions to reopen, may file a NACARA application with the INS; and (2) qualified family members of an individual with a NACARA case pending before the INS, or who has been granted NACARA suspension or cancellation, may move to close their deportation or removal proceedings and apply with the INS.

The interim rule retains the proposed fee of $215 for a single individual applying with the INS and $430 for a family collectively applying at the same time with the INS. The fee for applying with the immigration court is $100. Individuals who already have filed a suspension application and paid the fee to the immigration court, and who have their cases closed to pursue an application with the INS, still must pay the INS fee. However, individuals who previously filed Form EOIR-40 with the immigration court and now seek to file for NACARA relief with the INS need not complete the entire Form I-881. Instead, they may complete the first page of the I-881 and attach a copy of the previously filed EOIR-40, together with a copy of the order administratively closing their proceedings before the immigration court or the BIA.

The proposed rule required applicants who failed to appear for fingerprinting or interviews to show good cause in order to reschedule. The interim rule recognizes that this provision conflicts with the manner in which the *ABC* settlement treats rescheduling of interviews. Accordingly, the interim rule allows applicants to reschedule their interviews if they have a reasonable excuse. The request to reschedule should be submitted in writing before the interview date or immediately thereafter if the reason for missing the interview could not be foreseen. Under the interim rule, applicants who fail to appear for fingerprint appointments must show a reasonable excuse in the same manner as those who fail to appear for NACARA interviews. The INS recognizes that if the notice of fingerprinting or interview was not mailed to the address that the applicant provided to INS, this constitutes a reasonable excuse. Although the INS does not now have the capability to accept requests to reschedule fingerprint appointments, the agency still believes that applicants should make such requests in order to create a record that they attempted to comply with application requirements.

According to the interim rule, one change that the INS is making in response to commentators is to allow INS asylum officers to grant meritorious cases at the time of the interview. In addition, in cases where the officer decides to refer the case to the immigration court or dismiss the case, he or she must provide the applicant with written notification of the reasons for the decision.

The INS is also making a number of changes to the I-881 NACARA application form. These include modification of the extreme hardship questions to allow applicants who qualify for

the hardship presumption simply to provide "yes" or "no" answers. The INS also has agreed to delete the question that inquires whether applicants and their families have ever received public or private benefits. In deleting this question, the INS refers to the new guidance on public charge issues regarding the chilling effect on the legitimate use of benefits caused by such questioning (see special insert on this guidance in this issue).

The interim rule takes effect on June 21, 1999, but written comments to be used in development of a final rule may be submitted on or before July 20, 1999. Model comments to the rule are being developed by the Immigrant Legal Resource Center, which may be contacted by e-mailing Mark Silverman at mark@ilrc.org or faxing him at 415-255-9792.

[64 Fed. Reg. 27,855–82 (May 21, 1999).]

INS ISSUES GUIDANCE ON ACCEPTING ADJUSTMENT CASES UNDER § 245(i) – The Immigration and Naturalization Service has issued additional guidance concerning the acceptance of applications for adjustment of status under section 245(i) of the Immigration and Nationality Act. The guidance comes in the form of a memorandum issued by Executive Associate Commissioner Robert L. Bach on Apr. 14, 1999. Most importantly, the memorandum adopts a fairly broad interpretation of the statute's requirement that to be eligible for adjustment under section 245(i) individuals must have had an immigrant visa petition or application filed on their behalf on or before Jan. 14, 1998.

Adjustment of status is a procedure that allows eligible immigrants who are in the United States to obtain lawful permanent resident (LPR) status without having to leave the U.S. to attend an interview at a consulate abroad. Generally, immigrants must have been inspected and admitted or paroled into the U.S. in order to qualify for adjustment of status. However, INA section 245(i) allows eligible immigrants to adjust to LPR status even if they entered the U.S. without inspection or do not meet certain other requirements for normal adjustment—provided they pay an additional fee of $1,000.

In order to apply for adjustment under section 245(i), an immigrant must be the beneficiary of an immigrant visa petition or an application for a labor certification filed on or before Jan. 14, 1998. The new guidance explains that the INS has adopted an interpretation of this requirement that has come to be known as the "alien-based" reading of the statute. Under this interpretation, as long as an immigrant was the beneficiary of an immigrant visa petition or labor certification application on or before Jan. 14, 1998, he or she is "grandfathered" and eligible to adjust under section 245(i), even if the individual now seeks to obtain LPR status based on another petition or through some other means, and even if the original petition was subsequently revoked or denied.

For example, grandfathering could allow a son or daughter of an LPR—who was the beneficiary of a family second-preference petition filed before Jan. 14, 1998, but who subsequently married and thereby revoked the petition—to subsequently adjust when he or she is eligible to immigrate on some other basis. In this example, if the parent subsequently became a U.S. citizen, he or she could file a family-based third preference petition for the immigrant, who could then use grandfathering to adjust in the U.S. The immigrant could also adjust if he or she won the diversity visa lottery or became eligible to immigrate in some other manner.

In order to provide a basis for grandfathering, a visa petition or labor certification application need not be approved. However, it must have been "approvable" at the time it was filed. The memo cautions that "filings that are deficient because they were submitted without fee, or because they were fraudulent or without any basis in law or fact, should not be considered to have grandfathered the alien."

For "family-based petitions that were never adjudicated, or that were denied, revoked, or withdrawn," the memo instructs officers to review the I-130 petition to determine whether it was approvable at the time it was filed. The memo notes that where the adverse action took place because of a change in circumstances, the petition was probably approvable at the time it was filed. However, where there was no change in circumstances, a denial may have occurred because the beneficiary was not eligible, and this would preclude a finding that the petition was approvable at the time it was filed.

Employment-based petitions and labor certification applications also must have been "approvable when filed" in order to serve as a basis for grandfathering an immigrant. Petitions that were subsequently approved meet this standard unless the approval was revoked. Petitions that were denied, revoked, or withdrawn may also meet this standard. However, because determining the role of changed circumstances is more complex in the employment visa context, the INS is still in the process of formulating rules to be used to determine whether this standard is met. The INS plans to issue a future memorandum addressing the "approvable when filed" standard for employment-based petitions and labor certification applications.

The INS has subsequently acknowledged one error contained in the memo. The memo states that because adjustment under section 245(i) was not available until Oct. 1, 1994, an individual cannot be grandfathered unless his or her petition was pending on or filed after that date. However, the INS has acknowledged to the American Immigration Lawyers Association that this statement is in error and that petitions filed or approved prior to that date can be used for grandfathering purposes.

[INS Memorandum HQ 70/23.1-P (Apr. 14, 1999).]

INTERIM FINAL RULE ISSUED FOR ADJUSTMENT UNDER HAITIAN REFUGEE IMMIGRATION FAIRNESS ACT – The Immigration and Naturalization Service has issued an interim final rule establishing procedures to implement the special adjustment of status provisions of the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA). The HRIFA allows eligible Haitians to obtain lawful permanent resident status under a special program that is similar to the adjustment of status provisions for Nicaraguans and Cubans under the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA). The rule takes effect June 11, 1999, and the application period starts on that date.

The regulations' provisions governing eligibility for HRIFA adjustment largely track the language of the statute. To be eligible, an applicant must be a national of Haiti who was present in the United States on Dec. 31, 1995; must be admissible (but HRIFA waives certain grounds of inadmissibility); must have been physically present in the U.S. for a continuous period from on or before Dec. 31, 1995, to the date of filing an adjustment application (not counting absences totaling 180 days or less); must properly file

an adjustment application before Apr. 1, 2000; and must be fit into one of the following five categories:

1. Haitian nationals who filed for asylum before Dec. 31, 1995

2. Haitian nationals who were paroled into the U.S. prior to Dec. 31, 1995, "after having been identified as having a credible fear of persecution, or paroled for emergent reasons or reasons deemed strictly in the public interest"

3. Haitian nationals who were children, who arrived in the U.S. without parents, and who have remained without parents in the U.S. since their arrival

4. Haitian nationals who were children and who became orphaned after their arrival in the U.S.

5. Haitian children who were abandoned by their parents or guardians prior to Apr. 1, 1998, and who have remained abandoned

Individuals in categories 3 through 5 must have met the definition of *child*—i.e., under 21 years of age and unmarried—at the time they arrived in the U.S. and on Dec. 31, 1995, but do not still have to be children at the time they apply to adjust. Indeed, if they have subsequently married or acquired a stepchild, those dependents, if eligible, may also be able to adjust. However, the rule includes definitions for each of these eligibility categories that must be met and supported with documentation.

The physical presence requirement under the HRIFA is different than under the NACARA. Under the HRIFA, the principal beneficiary must have been physically present in the U.S. on Dec. 31, 1995. From that date, individuals must establish continuous physical presence, although they may have absences if they do not amount to more than 180 days in the aggregate. Periods of time in which individuals traveled outside of the U.S. pursuant to a grant of advance parole do not count toward the 180-day cumulative period. In addition, under the interim rule, eligible individuals may apply for parole authorization to come to the U.S. in order to apply for HRIFA adjustment. For individuals who are granted this authorization, periods of time when they were outside of the U.S., from the date of the HRIFA's enactment on Oct. 21, 1998, to July 11, 1999, and from the date they file a request for parole authorization until they are paroled into the country, also do not count toward the 180-day cumulative period.

In addition to persons in the above five categories, certain family members are eligible for adjustment under the HRIFA as dependents. To qualify as a dependent of a HRIFA beneficiary, a spouse, child (under age 21), or unmarried son or daughter (age 21 or older) of a HRIFA beneficiary must also be a national of Haiti. These dependents also must be admissible, except that the grounds of inadmissibility that are waived by the statute do not apply. Dependents must be physically present in the U.S. at the time they apply for adjustment. Unmarried sons or daughters over age 21 also must establish that they have been continuously physically present in the U.S. since Dec. 31, 1995, not counting absences totaling 180 days or less. There is no deadline by which dependent beneficiaries need apply for adjustment.

Under the statute, certain grounds of inadmissibility do not apply to applicants for HRIFA adjustment. These are the grounds of inadmissibility for the following: likelihood of becoming a public charge, failure to obtain a labor certification, failure to meet the requirements for foreign-trained physicians or foreign healthcare workers, entering or remaining in the country illegally, lacking valid entry documents, or accruing more than 180 days of unlawful presence prior to the individual's last departure or removal. Also, although INS regulations generally do not permit adjustment of individuals who were paroled into the country and have pending exclusion or removal proceedings against them, such individuals may adjust under the HRIFA.

Persons who currently have exclusion, deportation, or removal proceedings pending before an immigration judge or the Board of Immigration Appeals, or who filed a motion to reopen or reconsider a case on or before May 12, 1999, may apply for HRIFA adjustment with the immigration court. Cases on appeal with the BIA, or with pending motions to reopen or reconsider, will be remanded to the immigration court if the applicant "is not clearly ineligible for adjustment" under the HRIFA. The remand is for the sole purpose of adjudicating their HRIFA adjustment cases. In the event the IJ denies the adjustment, the IJ will certify the case to the BIA for decision. The respondents in such cases will not have to file a new notice of appeal nor pay an appeal filing fee.

Alternately, applicants with pending proceedings may move to have the them administratively closed in order to apply for adjustment with the INS. Administrative closure requires the agreement of the INS, and the supplementary information to the rule notes that the INS will issue field guidance shortly regarding the circumstances under which the agency will agree to requests for administrative closure. Cases that are administratively closed may be reopened if the respondent fails to apply for adjustment prior to Apr. 1, 2000, or if the INS denies the adjustment application. In the latter case, the respondent could seek reconsideration of the denied application in the recalendared proceedings.

Individuals whose cases were administratively closed or continued indefinitely with the consent of INS after Dec. 22, 1997, must apply for adjustment with the INS and may not seek to have their proceedings reinstated in order to apply from the immigration court until after the INS adjudicates the case. Individuals who have never been in proceedings also must apply with the INS. [64 Fed. Reg. 25,755–74 (May 12, 1999).]

INS ISSUES OPINION AND MEMO ON NATURALIZATION ISSUES: FAILURE TO REGISTER FOR SELECTIVE SERVICE AND INAPPROPRIATE DENIALS – The Immigration and Naturalization Service has issued a legal opinion and a policy memorandum regarding, respectively, the impact that an individual's failure to register for Selective Service has on his naturalization application and naturalization denials resulting from the INS's failure to send notices to an applicant's current address.

According to the legal opinion, issued by General Counsel Paul V. Virtue on Apr. 27, 1998, applicants who should have registered for Selective Service are barred from naturalization only if they knowingly and willfully failed to register during the period for which they must establish good moral character. If an applicant's knowing and willful failure to register occurred outside of that period, it does not result in an absolute bar to naturalization. However, the INS may consider the failure to register in assessing an applicant's eligibility to naturalize.

Among the conditions an applicant for naturalization must satisfy is the requirement, at section 316(a)(3) of the Immigration and Nationality Act, that he or she be "a person of good moral character." As stated in the opinion, the period during which an

applicant must demonstrate he or she has good moral character begins five years before the applicant files the naturalization application and continues through the date of admission to citizenship. In addition, applicants must be willing "to bear arms on behalf of the United States when required by the law." With the exception of aliens maintaining lawful nonimmigrant status, all males born after 1959 and residing in the U.S. must register for Selective Service when they reach their 18th birthday. The obligation continues until their 26th birthday.

Although the INA does not make compliance with the Selective Service requirement a condition for naturalization, the memo notes that the INS would nevertheless be "fully justified" in finding that a man who refuses to comply is unwilling to bear arms when the law requires. Such a finding would support the further inference that the applicant "is not disposed to the good order and happiness" of the U.S. Accordingly, naturalization applicants who fall within the relevant age range and refuse to register for Selective Service should be denied, the opinion instructs.

Once the applicant has turned 26, the situation changes because, though he once had the duty to register, he no longer has such a duty. However, the opinion adds that the INS may still find the applicant ineligible to naturalize on the basis of his failure to have registered unless he can establish that he did not knowingly and willfully fail to do so. The burden of proof rests with the applicant, and unless he can prove the contrary by a "preponderance of the evidence," the INS may presume his failure to register to have been knowing and willful.

The day after the applicant's 31st birthday, the situation changes again, because if he files his naturalization application on that date, or later, his failure to register will have occurred outside the period during which he must demonstrate good moral character. In such cases, the opinion instructs, the agency should first determine whether the failure to register was knowing and willful. If it was not, the INS should conclude that the applicant has satisfied the good moral character requirement, unless other adverse factors are present. And even if the applicant's failure were knowing and willful, he would not be absolutely barred from eligibility for naturalization. As long as the INS is satisfied that the applicant now meets the INA's good moral character requirement, naturalization could be granted even if he once may not have been able to satisfy it.

The opinion advises that the INS need not automatically disregard failures to register in the cases of applicants who are at least 31 years old and reiterates that the agency is entitled to consider improper conduct that occurred outside the statutory period. If the INS does make an adverse finding regarding an applicant's eligibility based on both a failure to register and other adverse factors that occurred outside the statutory period, the agency is instructed to explain in its decision why such factors combine to prove ineligibility for naturalization under INA section 316(a)(3). In reviewing such a decision, the opinion notes, a district court would have the legal authority to decide the matter de novo and make its own judgement as to the effect of a failure to register on the applicant's eligibility for naturalization.

In closing, the opinion rejects the argument that the permanent bars to naturalization contained in INA sections 314 and 315 should be extended to individuals who knowingly and willfully fail to register for Selective Service. Although Congress specifically enacted those provisions to permanently bar convicted deserters, persons convicted of departing to avoid the draft, and those who obtain an exemption from induction on the basis of their alien status, it did not enact a similar provision for persons who fail to register for the draft. Only under INA section 316(a)(3), if at all, would failure to register for Selective Service warrant a denial of naturalization.

A memo to all INS regional directors dated Mar. 23, 1999, addresses a different aspect of naturalization denials. It notes that naturalization denials have increased in nearly every regional office, prompting many congressional offices, community groups, and the media to contact the INS for an explanation. Specifically, those groups have raised the possibility that some applicants may have been improperly denied for failure to appear at a fingerprint appointment, interview, or ceremony because the INS did not send relevant notices to the applicants' current addresses.

According to the memo, the agency is attempting to solve the problem by setting up a toll-free "800" number through which address changes can be centralized and developing uniform procedural guidance INS offices should follow in the cases of individual applicants who claim to have been denied in error.

In the interim, the INS should "reopen on service motion" the applications of individuals who both claim that they were improperly denied and present a good faith claim to have notified the INS of an address change. The memo concludes with the statement that additional guidance outlining procedures for any necessary data collection will follow under separate cover.

[Virtue Memorandum, Apr. 27, 1998, reprinted in 76 *Interpreter Releases* 573–5 (Apr. 12, 1999); INS Memorandum, Mar. 23, 1999, reprinted in 76 *Interpreter Releases* 535 (Apr. 2, 1999).]

INS ESTABLISHES MANDATORY REVIEW POLICY FOR LONG-TERM DETAINEES – The Immigration and Naturalization Service has established a new policy mandating that INS district offices regularly review cases of individuals who are under final orders of removal but whose immediate repatriation is not possible. The mandatory reviews will be made prior to the expiration of the 90-day removal period and determine whether or not long-term detainees are eligible for release under authorization provided in changes made to the nation's immigration laws in 1996. Individuals who are found ineligible for release following the 90-day review will have their cases reviewed every six months thereafter.

Under section 241 of the Immigration and Nationality Act, the INS has 90 days within which to execute a removal order after it becomes final. After this period expires, individuals may be released from custody under an order of supervision. They may be detained beyond the 90-day period if they are inadmissible, deportable because of criminal or security grounds, or determined to be a danger to the community or a flight risk.

Although prior INS policy granted INS district directors the authority to conduct such case reviews, the new policy makes them mandatory and requires that subsequent, regularly scheduled reviews be conducted. According to an Apr. 30, 1999, statement, the INS will implement "uniform, standardized, and transparent" procedures under which the reviews are to take place.

In addition to announcing the mandatory reviews, the INS statement reiterates the right of any individual in long-term detention to request a review of his or her case at any time. The

reviews determine whether a change in circumstances warrants an individual's release. Release decisions are based on factors such as violations of criminal and immigration laws the individual committed, whether he or she has a history of violence while incarcerated, evidence of rehabilitation, and the extent of the individual's ties to the community.

INS ESTABLISHES REGULATIONS FOR FILING CLAIMS UNDER CONVENTION AGAINST TORTURE – As we reported in the last issue, the Immigration and Naturalization Service has published an interim rule setting forth procedures by which an alien in the United States may make a claim for protection against being expelled from the U.S. to face the possibility of being tortured in another country. The interim rule was issued pursuant to a congressional mandate contained in the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), the legislation that enacted into American law U.S. obligations to observe the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Punishment or Treatment (CAT). Under Article 3 of the CAT, "no State party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he or she would be . . . subjected to torture."

The interim rule marks a departure from the standards governing asylum applications in two important respects. First, the rule allows persons who fear being tortured abroad to file a claim for withholding of removal ("withholding") based on a ground not limited only to the five under which applicants for asylum may qualify for the relief — i.e., fear of persecution on account of race, religion, nationality, political opinion, or membership in a social group. The claimant need only demonstrate that removal will likely result in his or her being tortured by or with the acquiescence of government officials and that the torture will be committed for *any* reason. Second, for aliens who are statutorily barred from the relief of withholding of removal (i.e., those who have been convicted of serious crimes or have persecuted others), the interim rule has created a new category of relief, *deferral of removal* (DR).

Generally, a person's eligibility for withholding or DR under the CAT will be determined by an immigration judge during removal/deportation proceedings. The IJ first will determine whether the applicant is more likely than not to be tortured if she or he is removed from the U.S. Although the burden of proof for demonstrating this likelihood rests with the applicant, the rule does allow that "the testimony of the applicant, if credible, may be sufficient to sustain the burden . . . without corroboration." If the IJ finds that the applicant likely faces torture if removed and is not statutorily barred from withholding, the alien will be granted the relief. If the applicant is barred from receiving withholding, the IJ will grant him or her DR. The rule does not expand judicial review of denials by an IJ of either form of relief beyond levels currently available (i.e., in conjunction with review of a final order of removal).

Among the distinctions between withholding and DR, the rule's preamble identifies the "mode of termination" as most important. Under existing law, withholding can be terminated only when the INS moves to reopen the case, meets the standards for reopening, and establishes by a preponderance of the evidence that the alien is not eligible for withholding. The standards for reopening in the withholding context require the INS to offer evidence that was previously unavailable and establishes a prima facie case for termination. In the DR context, the INS must meet a lower threshold, which requires only that the evidence was not considered at the previous hearing and is relevant to the possibility that the alien would be tortured in the country of removal.

The rule also establishes special procedures, which are modeled on and amend the credible fear screening process currently in effect, for handling the cases of arriving aliens subject to expedited removal and aggravated felons. Arriving aliens who tell the asylum officer that they fear being persecuted in their home country will now also be examined to determine whether they have a credible fear of torture. An affirmative determination will be made if they show a "significant possibility" that they are eligible for withholding or DR under the CAT. In that event, the case will be referred to an IJ for proceedings, at which the alien will be able to assert claims to relief available under the CAT. The same process will apply to aggravated felons, except that they must meet a higher screening standard (i.e., they must show a "reasonable possibility" that they will persecuted or tortured) to qualify to have their cases referred to an IJ.

In addressing cooperation between the Departments of State and Justice, the rule permits the secretary of state to forward to the attorney general assurances the former has obtained from the government of a specific country that an alien would not be tortured if he or she were removed to that country. If the attorney general, in consultation with the secretary of state, finds the assurances sufficiently reliable to allow the alien's removal to that country, the rule provides that "the alien's claim for protection under the CAT shall not be considered further by an IJ, the BIA, or an asylum officer." Disturbingly, the rule does not acknowledge the possibility that, in some cases, attempts to obtain assurances may actually increase the likelihood that the applicant or his or her family members abroad will be tortured.

Since the rule was published, the INS finalized and disseminated supplemental instructions for Form I-589, the application for asylum and withholding of removal, pertaining to CAT claims. These instructions inform applicants that the I-589 form will be considered an application for withholding of removal under the CAT if the applicant tells the IJ that he or she would like to be considered for withholding relief under the CAT. The instructions also describe the nature of withholding of removal under the CAT and explain which persons are eligible for relief and which persons are barred.

Although the U.S. has been obliged to observe Article 3 of the CAT since 1994, the U.S.'s CAT-related obligations were not made fully a part of U.S. law until President Bill Clinton signed the FARRA last fall. The statute made Article 3 binding on all government officials and in all legal proceedings relating to removal.

Before the rule was issued, the INS had been processing CAT claims using informal procedures established by two internal INS memoranda. As we noted in the last issue, upon this rule's effective date, it entirely replaced the informal procedures, requiring that pending claims made under the latter be reviewed under the new regulations. Further, individuals under final orders of deportation, exclusion, or removal that became final prior to the interim rule's Mar. 22, 1999, effective date must file motions to reopen seeking CAT relief by June 21, 1999. The rule provides that such

motions will not be subject to the time and numerical limitations that ordinarily apply to motions to reopen. And the applicant will not be required to show "that the evidence sought to be offered was unavailable and could not have been . . . presented at the former hearing." [64 Fed. Reg. 8,478–96 (Feb. 19, 1999); INS Form I-589S (Mar. 22, 1999), reprinted in 76 *Interpreter Releases* 577 (Apr. 12, 1999).]

EOIR ISSUES PROCEDURES FOR HANDLING SUSPENSION AND CANCELLATION CASES ONCE ALLOTMENT FOR FY 1999 RUNS OUT – The Office of the Chief Immigration Judge has issued instructions to immigration judges regarding the procedures that they are to follow in handling suspension of deportation and cancellation of removal cases once the number of grants issued in such cases nears the 4,000 per year statutory cap for fiscal year 1999. Under the memo, in cases in which the hearing ends after the Chief Immigration Judge has notified IJs that grants in 3,800 cases have been issued, IJs are to write draft decisions granting or denying relief without revealing the decisions to the parties. These decisions will then be reserved until the next fiscal year, which begins Oct. 1, 1999.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) established a cap on the number of cases of individuals who can be adjusted to permanent residence based on grants of suspension of deportation or cancellation of removal in any one fiscal year. This cap was subsequently modified by the Nicaraguan Adjustment and Central American Relief Act (NACARA), enacted in November 1997. The Executive Office for Immigration Review, of which the Office of the Chief Immigration Judge is a part, has developed somewhat different procedures for implementing this cap in each subsequent fiscal year.

The most recent instructions are contained in a memorandum issued by Chief Immigration Judge Michael J. Creppy on Apr. 14, 1999. According to the memo, the Office of Chief Immigration Judge will issue a notification when 3,800 suspension or cancellation cases have been granted in fiscal year 1999, and the date of this notification will be considered the cutoff date. (We understand that this cutoff date was reached in early May 1999.) As of the cutoff date, IJs must reserve decisions in all suspension and cancellation cases, with two exceptions. These exceptions are for (1) cases that can be pretermitted because the applicant failed to establish eligibility for relief under the statute, and (2) cases that can be denied in the exercise of discretion because the applicant will be granted asylum or adjustment of status. The memo prohibits IJs from rescheduling cases to earlier dates in order to hear a case while numbers are still available.

After the cutoff date, 90 percent of the remaining numbers for fiscal year 1999 will be allocated to the immigration court, and the remainder will be allocated to the Board of Immigration Appeals. The remaining numbers allocated to the immigration court will first be used in cases where the IJ granted relief before the cutoff date but the grant was not entered into the ANSIR computer data base, and then in cases where decision was reserved after the cutoff date, allocated according to the dates and times that the IJ reserved decision.

In cases where the IJ must reserve decision, he or she should close the record and note the date and time on the immigration judge worksheet. The memo directs the IJ not to reveal to the parties, "either on the record or off," whether he or she is contemplating a grant or a denial of the case. The IJ must then either dictate or write a draft decision in the case, outside of the presence of the parties.

As discussed above, some of these reserved decisions may be finalized if numbers are left after all grants issued prior to the cut-off date are identified and allocated numbers. After the new fiscal year begins on Oct. 1, 1999, the remaining reserved decisions can be reviewed by the IJ, issued, and mailed to the parties.

[EOIR Memorandum OPPM 99-2: Procedures on Handling Applications for Suspension/Cancellation Once Numbers Are No Longer Available for Fiscal Year 1999 (Apr. 14, 1999).]

BIA: PERSON WHOSE CONDITIONAL PERMANENT RESIDENCE WAS TERMINATED MAY APPLY EARLY FOR A WAIVER – The Board of Immigration Appeals has held that an individual whose conditional permanent residence was terminated by the Immigration and Naturalization Service may apply for a waiver of the joint petition requirement prior to the period during which such petitions are required to be filed.

Under section 216 of the Immigration and Nationality Act, aliens granted conditional permanent residence due to marriage to an American citizen must file, along with their spouse, a petition to remove the conditions on residence; and the petition must be filed within the 90 days preceding the second anniversary of the date the status was granted. Documentary evidence proving that the involved parties did not marry in order to evade the immigration laws of the United States must accompany the petition. Individuals in certain circumstances may apply for a waiver of the joint petition requirement, and one ground for a waiver is that the marriage was entered in good faith but terminated and that deportation would cause extreme hardship.

The petitioner in the case before the BIA, a New Zealand national named Henry Stowers, had his conditional status terminated by the INS on two separate occasions, each time on different grounds. The first termination occurred on Oct. 11, 1996, less than a month after status had been granted. On learning Stowers did not reside with his wife, the INS initiated deportation proceedings by issuing an Order to Show Cause, based on INA section 216(b)(1)(A)(I). The second occurred on Feb. 24, 1997, when, only three days after Stowers' divorce, the INS issued another allegation supporting his deportability, based on INA section 241(a)(1)(D)(I), which authorizes the attorney general to terminate the conditional residency of aliens who divorce their U.S. citizen spouses. In doing so, the agency dropped the original allegation (i.e., that the marriage was fraudulent). Although the INS failed to issue, on either occasion, a notice of intent to terminate, these lapses proved not to be at issue in the appeal.

Rather, the BIA's decision turned on the question of whether Stowers was eligible to file for a waiver of the joint petition prior to the 90-day period in which the petitions are required to be filed. Because the termination of the petitioner's status occurred before the 90-day petitioning period, the INS contended that Stowers' only remedy was to have the termination reviewed in a deportation hearing. In refusing to adjudicate Stowers' application, the INS asserted that it had neither the statutory nor regulatory authority to waive the petition requirement. The immigration judge disagreed, and after construing the INS's refusal to adjudi-

cate as a "constructive denial," the IJ ruled on the waiver application, finding that the petitioner did not carry the burden of proving he entered the marriage in good faith. The IJ also declined to rule on the portion of the application alleging that Stowers would suffer "extreme hardship."

Both parties appealed the decision to the BIA, with the INS contesting the IJ's interpretation of the agency's refusal to adjudicate (but not his issuance of the denial of the waiver application) and Stowers arguing that the IJ's failure to rule on his extreme hardship claim violated his due process rights.

Citing *Matter of Lemhammad*, Int. Dec. 316 (BIA 1991), and INA section 216(c)(4), the BIA disagreed with the INS and ruled that the IJ correctly permitted the petitioner to file a waiver application even though his conditional residency was terminated prior to the 90-day petitioning period. Although the BIA recognized that because waiver applications are filed as alternatives to joint petitions, they are "*normally* filed within the 90-day period preceding the end of the two-year conditional residence period," the BIA ruled that, in some situations, filing a waiver application outside that period is appropriate.

However, the BIA further held that the IJ had erred in construing the INS's refusal to adjudicate as a "constructive denial" and ruling on the waiver application. Citing *Matter of Mendes*, Int. Dec. 833 (BIA 1994), the BIA held that the IJ should have continued proceedings to allow the INS to adjudicate the waiver application.

Accordingly, the BIA remanded the case to the IJ for adjournment of the deportation proceedings pending the INS's adjudication of the petitioner's waiver application. The BIA instructed that if Stowers is determined to have met the conditions of the waiver application, the INS should remove the conditions on his residency status. If his waiver application is denied, only then can it be submitted to the IJ for review.

In re Henry Stowers, Int. Dec. 3383 (BIA Mar. 26, 1999).

BIA: AMNESTY LPR WAS "ADMITTED," IS REMOVABLE BASED ON "AFTER ADMISSION" AGGRAVATED FELONY – In the case of a lawful permanent resident who was convicted of an aggravated felony after adjusting status under the amnesty provisions of Immigration and Nationality Act section 245A(b), the Board of Immigration Appeals has ruled that her adjustment constitutes an "admission" to the United States and renders her removable under INA section 237(a)(2)(A)(iii) as an alien convicted of an aggravated felony "after admission."

The respondent initially entered the U.S. without inspection in 1979. In 1989, she received amnesty and adjusted status to become a lawful permanent resident. On Mar. 4, 1997, she was convicted under California law for transporting a controlled substance. She was placed in removal proceedings and charged under INA section 237(a)(2)(A)(iii) as being removable as an alien convicted of an aggravated felony after admission to the U.S.

The immigration judge concluded that the respondent was not deportable because she had not been convicted "after admission." The IJ based his conclusion on the fact that the respondent had never been "admitted" to the U.S. within the meaning of INA section 101(a)(13)(A). That section provides that the terms *admission* and *admitted* mean, with respect to an alien, the lawful entry of the alien into the U.S. after inspection and authorization by an immigration officer.

The BIA agreed with the IJ that the respondent's adjustment of status does not meet the literal terms of the definition of *admission* or *admitted* described in INA section 101(a)(13)(A) because adjustment is not an "entry." Nonetheless, the BIA concluded that the respondent was removable as charged.

To determine that the respondent was "admitted" to the U.S., the BIA did not focus on the definition of *admission* in INA section 101(a)(13)(A). Rather, it reviewed the phrase "lawfully admitted for permanent residence" found in INA section 101(a)(20) and other sections of the INA. Section 101(a)(20) defines the term "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." The BIA ruled that the respondent, having been accorded lawful permanent resident status under the amnesty provisions of INA section 245A, was "lawfully admitted for permanent residence" under the definition in INA section 101(a)(20).

The BIA then framed the issue before it as whether the phrase "after admission" in INA section 237(a)(2)(A)(iii) includes people, like the respondent, who have adjusted status and been "lawfully admitted for permanent residence" under the definition in section 101(a)(20). The BIA found that it does.

The BIA reviewed numerous general provisions pertaining to adjustment of status to support its finding that aliens "lawfully admitted for permanent residence" through the adjustment process are considered to have accomplished an "admission" to the U.S. Among other things, the BIA indicated that aliens granted legalization under the amnesty provisions of INA section 245A are characterized as having been "lawfully admitted for permanent residence." It also noted that under the general provisions for adjustment of status, the attorney general is instructed to "record the alien's lawful admission for permanent residence." In addition, the BIA noted that other provisions for adjustment of status also confer upon the applicant the status of "an alien lawfully admitted for permanent residence."

The BIA also examined changes to immigration law enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to provide further insight into the meaning of the term *"admission."* Among other things, the BIA noted that INA section 237, which pertains to general classes of deportable aliens, appears to recognize that at least some aliens who have adjusted to permanent resident status have been "admitted" to the U.S. It also noted that procedural provisions introduced by the IIRIRA, particularly INA section 240(c)(2) (which concerns the burden of proof in removal proceedings), also support a reading of the term *"admitted"* to include aliens who have adjusted their status to that of an alien lawfully admitted for permanent residence.

Based on the foregoing, the BIA concluded that the respondent was "admitted" to the U.S. when her status was adjusted to that of "an alien lawfully admitted for permanent residence" pursuant to section 245A(b) of the INA. The BIA observed, "[A]lthough this change in status does not meet the definition of an 'admission' in section 101(a)(13)(A), because entry occurred prior to the determination of admissibility, that definition does not set forth the sole and exclusive means by which admission to

the U.S. may occur under the Act. Admissions also occur after entry through the process of adjustment of status under section 245 and 245A. Such admissions are explicitly recognized in the language of section 101(a)(20)." As such, the BIA held that the respondent was removable under INA section 327(a)(2)(A)(iii) as an alien convicted of an aggravated felony "after admission."

Matter of Rosas, Int. Dec. 3384 (BIA Apr. 7, 1999)

BIA ADDRESSES EXTREME HARDSHIP REQUIREMENTS FOR § 212(i) WAIVERS – The Board of Immigration Appeals has found that the recent amendments to Immigration and Nationality Act section 212(i), which requires that aliens seeking a waiver of inadmissibility must establish that their being refused admission will result in extreme hardship to their U.S. citizen or lawful permanent resident spouse or parent, apply to pending cases. The BIA's decision also outlines the factors to be used in determining whether an alien has established extreme hardship pursuant to INA section 212(i). Finally, the decision holds that the underlying fraud or misrepresentation for which an alien seeks a waiver of inadmissiblity under section 212(i) may be considered as an adverse factor in adjudicating the waiver application in the exercise of discretion.

The respondent, a Mexican national named Cervantes-Gonzalez, was convicted of possessing a false identification document, namely, a counterfeit Texas birth certificate. The Immigration and Naturalization Service subsequently placed him in deportation proceedings. In October 1995, he admitted the allegations in the Order to Show Cause and Notice of Hearing and was found deportable by the immigration judge.

While in proceedings, the respondent married a U.S. citizen. He filed a request for adjustment of status based on an approved immigrant visa petition filed by his U.S. citizen spouse. However, the IJ found the respondent inadmissible under INA section 212(a)(6)(C)(I), which provides that "any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the U.S. or other benefits provided under this Act is inadmissible." The respondent then filed a waiver of inadmissibility for fraud or misrepresentation under INA section 212(i).

In adjudicating the waiver application, the IJ found that the respondent failed to establish extreme hardship to his spouse as required by INA section 212(i) and denied the respondent's requests for a waiver of inadmissibility and adjustment of status. He also denied the respondent voluntary departure.

On appeal to the BIA, the respondent argued that he did not require a waiver of inadmissibility because he is not inadmissible under INA section 212(a)(6)(C)(i). The respondent argued that his sole conviction for possessing a false identification document—namely, the counterfeit Texas birth certificate—with the intent to defraud the U.S. (by obtaining a U.S. passport) does not fall within the definition of fraud in the INA. He asserted that since his conviction was only for possession, he was not guilty of seeking to procure a fraudulent document.

The BIA disagreed. It noted that the respondent had admitted to procuring one document in the form of a fraudulent birth certificate. He had testified that he purchased the birth certificate to obtain employment, used the birth certificate to procure fraudulently a Social Security number, and used both documents to seek to procure a passport. The BIA concluded that these activities clearly fall within the purview of INA section 212(a)(6)(C)(i) because the respondent sought to procure both "documentation" and "other benefits" under the INA by fraud and by willful misrepresentation of a material fact.

The respondent next argued that he had not been provided an adequate opportunity to present evidence on the issue of extreme hardship and asked that his case be remanded so that he could do so. While the respondent was in proceedings, section 349 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IRIRA) amended section 212(i) of the INA to require that an alien seeking to overcome a ground of inadmissibility must show that being denied admission will result in extreme hardship to his or her U.S. citizen or permanent resident alien spouse or parent. The respondent argued that, due to the changes, he had not been given an adequate opportunity to present evidence on the issue of extreme hardship, and he sought a remand. The BIA declined to remand.

The BIA noted that changes made by IIRIRA section 349 took effect on Sep. 30, 1996, which preceded the adjudication of the respondent's case on Jan. 21, 1997. It said that the record reflects that the parties were aware that the extreme hardship requirement added by the IIRIRA applied to the respondent's case and that he had ample opportunity to present evidence in this regard.

The BIA also noted that the respondent had conceded that the new requirement of a showing of extreme hardship applied to him even though his application for relief was filed prior to the enactment of the IIRIRA. The BIA said that this concession accorded with the attorney general's opinion, *Matter of Soriano*, Int. Dec. 3289 (BIA, A.G. 1996), which held that new statutory rules of eligibility for discretionary forms of relief do not permit the attorney general to grant such relief in pending cases to aliens who do not qualify under the new rules. The BIA found that the amendments to INA section 212(i) are substantially similar to those discussed in *Matter of Soriano* and found that they must be applied to pending cases.

Therefore, the BIA concluded that because the IIRIRA section 349 amendments took effect on Sep. 30, 1996, the IJ properly applied them to the respondent's pending case on Jan. 21, 1997. The BIA also found no basis on which to remand the matter to allow the respondent to develop additional facts to bolster his "extreme hardship" argument.

The BIA then analyzed the "extreme hardship" requirement for qualifying for a waiver under INA section 212(i) and concluded that the respondent did not meet it.

The BIA set out a list of factors to be considered in determining whether an alien has established extreme hardship pursuant to INA section 212(i). It noted that the factors include, but are not limited to, the following: the presence of lawful permanent resident or U.S. citizen family ties to this country; the qualifying relative's family ties outside the U.S.; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties to such countries; the financial impact of departure from this country; and, finally, significant conditions of health, particularly when tied to the unavailability of suitable medical care in the country to which the qualifying relative would relocate.

In applying some of the factors to the respondent's case, the

BIA found that the respondent's wife knew that he was in deportation proceedings when they married and was aware that she might be forced to choose between separating from her husband or going with him to Mexico if he were deported. Furthermore, the BIA reasoned, because the respondent's wife speaks Spanish and the majority of her family is originally from Mexico, she should have less difficulty adjusting to life in a foreign country. The BIA also found that neither the respondent nor his wife has any significant financial ties to the U.S. The respondent's wife is currently unemployed and the respondent is a musician in a band. He provided no evidence to prove that it had experienced success such that deportation would cause him to relinquish a lucrative career and plunge his wife into unaccustomed poverty. In sum, the BIA concluded that the respondent failed to show that his spouse would suffer extreme hardship over and above the normal economic and social disruptions involved in the deportation of a family member.

Finally, the respondent argued that it was improper for the IJ to have considered fraud as an adverse factor in denying him relief under section 212(i) of the INA as a matter of discretion. The BIA disagreed and cited *INS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996), and *Matter of Tijam*, Int. Dec. 3372 (BIA 1998), for the proposition that it was proper for the IJ to have done so.

The BIA concluded that the respondent failed to establish eligibility for a waiver of inadmissibility under section 212(i). Thus, it concluded he is also ineligible for adjustment of status. In addition, the BIA found the IJ properly considered the respondent's underlying fraud as an adverse factor when denying him relief as a matter of discretion. Accordingly, the BIA dismissed the respondent's appeal.

This ruling relied on *Matter of Soriano*, in part, for the proposition that the changes made by the IIRIRA to section 212(i) that pertain to extreme hardship must be applied to *pending* cases. The ruling's continued validity may be doubtful in light of the fact that three circuit courts have rejected the retroactivity analysis of *Matter of Soriano*. *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998) *cert. denied*, 119 S.Ct. 1140 (1999); *Henderson v. Reno*, 157 F.3d 106 (2nd Cir. 1998), *cert. denied sub nom Reno v. Navas*, 119 S.Ct. 1141 (1999); *Mayers v. U.S. I.N.S.*, __ F.3d __, 1999 WL 317121 (11th Cir., May 20, 1999).

Matter of Cervantes, Int. Dec. 3380 (BIA Mar. 11, 1999).

DOJ PROPOSES REGULATIONS IMPLEMENTING ITS AUTHORITY TO ENLIST LOCAL POLICE ASSISTANCE – The U.S. Department of Justice has issued proposed regulations intended to implement provisions in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) that enabled the Immigration and Naturalization Service to authorize state and local law enforcement officers to provide assistance to federal authorities in an immigration emergency. Enacted under section 372 of the IIRIRA, the provision added section 103(a)(8) to the Immigration and Nationality Act. The new section empowers the attorney general to "draw upon the . . . assistance of state and local [police]" in carrying out the mission performed by INS officers.

As described in the preamble, the rule provides a mechanism through which a "trained cadre" of state and local police officers will be available to enhance the federal government's capacity to respond to immigration-related emergencies. The rule provides that state and local police personnel must first complete INS-prescribed training in basic immigration law, enforcement fundamentals, civil rights law, and cultural awareness and sensitivity issues before they would be allowed to render assistance to the federal agency. The INS is to provide all training materials and will conduct training sessions for designated personnel at sites located, when possible, in the areas where they normally operate.

The particular state or local police authority enlisted in this manner would be required to pay its officers' costs for transportation, lodging, and subsistence. To help defray those expenses, the new rule is tied to and amends existing regulations relating to the Immigration Emergency Fund (28 C.F.R. Part 65). By doing so, the rule purports to "assure state and local law enforcement agencies that they will not bear undue increased operational expenditures."

The regulations mandate that, following a presidential determination that an immigration emergency exists, the AG must negotiate a written agreement with appropriate local or state officials. Minimally, such agreements must contain or describe the following eleven elements:

1. The powers, privileges, or duties that state or local police will be authorized to perform or exercise and the conditions under which they may do so

2. The types of assistance rendered by state and local police for which the AG will be responsible for reimbursing appropriate parties

3. A statement that relevant state or local personnel are authorized to perform the functions of INS officers or employees under 8 U.S.C. section 11039a)(8) only after the AG has made a determination pursuant to that section and authorizes such performance

4. The training requirement described earlier

5. A description of both the length of time the written agreement will be effective and the authority the AG will confer upon state and local police officers, as well as a mechanism for amending, terminating, or extending the duration of authority and/or the written agreement

6. A requirement that the performance of any INS officer functions by local police be at the INS's direction

7. A requirement that law enforcement officers performing INS officer functions must follow the policies and standards about which they received instruction during INS-prescribed training

8. A roster, by position (and title and name when available) of INS officers authorized to provide operational direction to local police assisting federal authorities

9. Provisions relating to the use of federal property or facilities by local police, if such use is warranted

10. A requirement that the local law enforcement agency whose personnel is performing INS officer functions will cooperate fully in any federal investigation connected to the written agreement

11. A procedure through which the AG may notify the appropriate local agency that its personnel will be enlisted for service, under delegated authority, to enforce immigration laws under the provisions of the written agreements

As an *Interpreter Releases* article on the new rule observes, other than the details relating to the written agreement, the regulations are short on details, especially those that might describe specifically the kinds of functions that would be delegated. "Pre-

sumably," the article speculates, "this will be accomplished in the individual agreements foreseen by the rule."

The *Interpreter Releases* piece also notes that a number of immigration advocates view the authority conferred by IIRIRIA section 372 uneasily. The article quotes Carol Wolchok of the American Bar Association's Center for Immigration Law as saying that "because immigration is a federal responsibility, 'the AG should be careful before involving state and local officials in immigration functions.'" Even with training, she said, local police may not be able to assist beyond providing backup support for INS officers.

The proposed rule was issued on Apr. 8, 1999, and the public comment period ends on June 7, 1999.

[64 Fed. Reg. 17,128–30 (Apr. 8, 1999); 76 *Interpreter Releases* 558–59 (Apr. 12, 1999).]

Litigation

COURTS MUST DEFER TO BIA'S DEFINITION OF "SERIOUS NON-POLITICAL CRIME" AS A BAR TO WITHHOLDING – The United States Supreme Court has issued a unanimous decision reversing the Ninth Circuit Court of Appeals and upholding the underlying decision of the Board of Immigration Appeals in a withholding of deportation case. The case concerns the bar to eligibility for the relief of withholding of deportation for individuals who committed a "serious nonpolitical crime" before arriving in the United States. The Court reversed the appellate court because the latter had failed to accord sufficient deference to the BIA's interpretation of the statute.

Withholding of deportation is a form of relief that prohibits the Immigration and Naturalization Service from deporting an individual to a country where his or her life or freedom would be threatened on account of race, religion, nationality, political opinion, or membership in a particular social group. A similar form of relief, withholding of removal, is available to individuals in removal proceedings. Unlike asylum, withholding is a mandatory form of relief that must be provided to eligible individuals. However, individuals are not eligible for withholding if they committed a "serious nonpolitical crime" before coming to the U.S.

In this case, the respondent is a Guatemalan national. The evidence at his deportation hearing established that he was active in a student group in Guatemala from 1989 to 1992. He testified that, to protest government policies, he had participated in setting about ten buses on fire after forcing the passengers out of the buses. Passengers who refused to leave were stoned, hit with sticks, or bound with ropes. The protesters also vandalized private shops after forcing the customers out of them.

The immigration judge found that the respondent had established a clear probability of persecution and granted him withholding of deportation and asylum. The BIA reversed, without addressing the likelihood that the respondent would be persecuted in Guatemala. Rather, the BIA found the respondent ineligible for withholding because "the criminal nature of the respondent's acts outweigh their political nature." The BIA also denied his asylum application in the exercise of discretion.

On petition for review, the Ninth Circuit reversed and ordered the case remanded. The court did not disagree with the BIA's procedure of weighing the political nature of the respondent's acts against their criminal character, to determine whether the acts are "disproportionate to the [political] objective" and constitute a serious nonpolitical crime. However, the court concluded that the BIA had erred by not taking into account three additional considerations. First, the BIA should have considered the persecution that the respondent faced if returned to Guatemala and should have balanced "his admitted offenses against the danger to him of death." Second, the BIA failed to consider whether the respondent's actions were "of an atrocious nature" rather than simply criminal. Finally, the BIA failed to consider the respondent's offenses in relation to his "declared political objectives" and the "political necessity" for his methods.

On petition for writ of certiorari, the Supreme Court reversed. The Court concluded that the Ninth Circuit failed to afford adequate deference to the BIA's interpretation of the statute. Citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), the Court noted that where a statute is "silent or ambiguous" with respect to an issue, the question for the court is whether the interpretation of the agency charged with administering the statute "is based on a permissible construction of the statute."

With respect to the BIA's failure to consider the risk of the respondent's persecution as a factor in determining whether he committed a serious nonpolitical crime, the Court found that it was reasonable for the BIA to interpret the statute in this manner. It noted that the risk of persecution must be considered in order to find the respondent eligible for withholding but that it need not be considered in determining whether he committed a serious nonpolitical crime.

Regarding whether the BIA should have assessed the "atrocious nature" of the respondent's acts, the Court said that "gross disproportion and atrociousness are relevant in the determination" of whether an act is a serious nonpolitical crime under the BIA's test. "In the BIA's judgement, where an alien has sought to advance his agenda by atrocious means, the political aspect of his offense may not fairly be said to predominate over its criminal character." However, even where none of the acts are considered "atrocious," the criminal element of an act may outweigh its political aspect, and therefore the BIA does not need to consider atrociousness in every case.

Finally, the Court found that the BIA's weighing of the criminal and political aspects of the respondent's acts was sufficient to satisfy the requirement that the "necessity" of those acts be considered.

INS v. Aguirre-Aguirre, __ U.S. __, No. 97-1754 (May 3, 1999).

9TH CIRCUIT: FAILURE TO ALLOW ASYLUM APPLICANT TO ADDRESS CREDIBILITY ISSUE VIOLATES DUE PROCESS – The Ninth Circuit Court of Appeals recently held that the Board of Immigration Appeals violated an asylum applicant's due process rights when it decided that he is not credible without giving him a reasonable opportunity to explain the apparent inconsistencies in the record of his case. The appeals court decision resulted after the BIA, on its own initiative and without giving the applicant an opportunity to address issues about his credibility, had reversed an immigration judge's holding that the petitioner is credible and qualifies for asylum.

The applicant, a citizen of Bulgaria, entered the United States

on a tourist visa in 1992 and applied for asylum on Sep. 14, 1992. The Immigration and Naturalization Service denied his initial asylum application and issued an Order to Show Cause. He then submitted a second application. He had an asylum merits hearing at which the IJ reviewed both asylum applications.

In his two asylum applications and in testimony before the IJ, the applicant testified that in March 1992 he attended a political rally of Turkish and other minorities in Sofia, where he lived. Two radio reporters interviewed him at the rally; they asked what his name was, why he was there, and how he viewed the situation of minority groups in Bulgaria. In his second application for asylum, the applicant indicated that he tried to explain to the interviewers that he felt all Bulgarians needed to cooperate during this time of change and to work together to slowly bring about changes in the country. He felt that minority people had been deprived of certain rights—such as the use of their own language and names—and they wanted these problems rectified as soon as possible. He continued by saying that this would be difficult to achieve and that change had to be made slowly. The interview was broadcast on the radio.

Following the rally, the applicant and his wife received about 25 threatening telephone calls at their home. He testified that he was sure they were in reaction to the radio interview he gave at the rally.

During the same period, the applicant was attacked three times by different people he did not know. In the first attack, a man accosted the applicant and beat him while making statements such as, "You know who you are" and, "You know what you did." The second time, two men beat him and repeated the kinds of statements the first attacker made. The applicant testified before the IJ that he lost a tooth as a result of this attack. During the third attack, according to the second asylum application and the applicant's testimony before the IJ, the attacker tried unsuccessfully to stab him with a knife. The attacker repeated the statements that the applicant's earlier attackers had made to him. He testified that he was certain the attacks, like the telephone calls, were the work of extremists within the Turkish community who objected to the views he expressed during the radio interview.

The IJ found the applicant credible and granted him asylum, after which the INS appealed the asylum grant but did not contest the IJ's credibility finding. On its own initiative, the BIA raised the issue of the applicant's credibility and reversed the IJ's finding after concluding that the applicant was not credible.

The BIA listed four inadequacies that it perceived in the asylum application to support its conclusion regarding the applicant's credibility. First, it contended that in the initial asylum application the applicant stated that he had been stabbed in the third attack. In the second application and testimony related to it, he stated that he had been threatened with a knife but not stabbed. Second, the BIA indicated that in the first application, the applicant stated that members of both the Turkish and gypsy minority groups had persecuted him. In his later application and testimony, he stated that the gypsies were not involved. Third, the BIA indicated that in his testimony before the IJ, the applicant had stated that his tooth was broken during his second beating, but later in his testimony he stated that it had happened during his third beating. And, in his applications, he had not mentioned a tooth being broken. Fourth, the applicant had failed to produce any documentary or other objective evidence to corroborate his allegations.

After finding the applicant not credible, the BIA addressed the merits of the case in just one sentence. It concluded that the applicant's experiences in Bulgaria do not rise to the level of persecution or that he would encounter any difficulties upon his return to Bulgaria, years after the radio interview was reportedly broadcast.

In its decision, the Ninth Circuit noted that the INS did not raise the issue of the applicant's credibility in its appellate brief to the BIA and that the BIA raised the issue on its own initiative. Thus, the applicant had no notice of, or opportunity to be heard on, the credibility issue before the BIA rendered its decision. The court concluded that the BIA violated the applicant's due process rights in making an adverse credibility finding without affording him any opportunity to explain the supposed inconsistencies in his written and oral testimony.

The appeals court also noted that the BIA's treatment of the merits of the applicant's claim was contained in only one sentence. Such a conclusory statement, the court held, does not amount to a sufficient analysis of the merits of the applicant's claim, and the BIA must provide a reasoned analysis of the legal basis for its ruling, specifying the particular facts on which that ruling relies.

The court vacated the BIA's denial of asylum and remanded the case so the applicant could be provided a reasonable opportunity to explain the inconsistencies the BIA perceived in his application. In any case, the court noted that if the BIA persists in finding the applicant not credible, it must provide a "legitimate articulable basis" for its finding and "must offer a specific, cogent reason for any stated disbelief." The Ninth Circuit also cautioned the BIA that minor inconsistencies cannot support an adverse credibility finding and that "trivial errors by an asylum applicant do not constitute a valid ground upon which to base a finding that an asylum applicant is not credible." It noted in particular that where an applicant initially gives one account of persecution but then revises his story so as to "lessen the degree of persecution he experienced rather than to increase it," the discrepancy generally does not support an adverse credibility finding. *Stoyanov v. INS*, __ F.3d __, 1999 WL 228336 (9th Cir. Apr. 21, 1999).

9TH CIRCUIT: VICTIM OF MIXED-MOTIVE PERSECUTION QUALIFIES FOR ASYLUM – The Ninth Circuit Court of Appeals has reversed the denial by the Board of Immigration Appeals of a Philippine national's application for asylum and withholding of removal, holding that the BIA erred in concluding that the persecution she suffered was exclusively "nonpolitical." Applicants for asylum must demonstrate that they have a credible fear of being persecuted on account of one of five statutory grounds, which include political opinion, if they are returned to their home countries. In its decision, the appeals court held that the petitioner, a Ms. Borja, had suffered from "extortion plus [political persecution]" and therefore qualifies for relief.

On Sep. 22, 1992, armed operatives of the New People's Army (NPA), a Communist group, confronted Borja while she was working in her parents' business. They asked her to join and support their organization. She refused, telling them she was "pro-gov-

ernment" and that she would not enlist. However, she told them that she would pay "taxes" so that they would not kill her.

The NPA responded by demanding 3,000 pesos from her as "revolutionary taxes." The assailants left, telling her they would return monthly for payment and that she would be killed if she notified the police or authorities. The assailants appeared monthly to collect on their demands.

In February 1993, the NPA doubled its demand to 6,000 pesos, an amount that Borja said she could not pay. The NPA assailants became angry, beat her, put a gun to her head, and slashed her with a knife. The assailants departed, telling her they would murder her if she could not provide the money. Borja sought medical treatment, moved out of her house, went into hiding, and ultimately fled the country.

In its decision, the BIA had concluded that Borja suffered "economic extortion" and that the extortion was exclusively "non-political." The Ninth Circuit disagreed.

The appeals court noted that Borja articulated her political opposition to the NPA as the reason for her refusal to join. In response to her statement, the NPA assailants became angry and pointed a gun at her. When Borja saw their anger at her vocal resistance, she thought they were going to kill her. She interrupted this possibility by changing the subject to their demand for money and said that she would pay "taxes" if necessary so they would not kill her. Under the circumstances, the court held, no reasonable fact finder could fail to see the role her outspoken political opinion played both then and thereafter in what happened to her at the hands of the NPA.

The court approvingly cited BIA member Lory Rosenberg's dissent, in which she wrote, "The case before us is an example of what we might call 'extortion plus.'" "[H]ad [Borja] not interjected her willingness to pay," the Ninth Circuit reasoned, "the evidence strongly suggests that the NPA would have taken her life as a response to her political statement. Quite possibly, other NPA episodes of robbery and extortion have been purely economic in nature, but this one clearly had mixed motives." The court concluded that Borja was persecuted by the NPA, at least in part on account of her political opinion.

The court held that since Borja demonstrated that she had suffered past persecution, she is entitled to the legal presumption that she has a well-founded fear of future persecution. In order to rebut this presumption, the Immigration and Naturalization Service must show by a preponderance of the evidence that conditions in the Philippines have changed to such an extent that Borja no longer has a well-founded fear that she would be persecuted should she return there.

The Ninth Circuit then reviewed the State Department's *1995 Profile of Asylum Claims and Country Conditions* regarding the Philippines, parts of which the INS had used to make its case. The court noted that the *Profile*, in its entirety, gave no indication whatsoever that Borja does not have reason to fear death at the hands of the NPA. In fact, the *Profile* fully corroborates Borja's testimony that the NPA is a dangerous group that murders people who oppose it. The court concluded that the INS failed to meet its burden.

The court also held that the BIA failed to apply the relevant facts in the *Profile* to the specific threat faced by Borja. The court reiterated, "Our cases hold that 'individualized analysis' of how changed conditions will affect the specific petitioner's situation is required. Information about general changes in the country is not sufficient."

The appeals court held that Borja met the statutory requirements to qualify for withholding of deportation and asylum. It remanded the case to the BIA to issue an order granting withholding of deportation and to determine, in the exercise of discretion, if Borja qualifies for asylum.

Borja v. INS, __ F.3d __, 1999 WL 253186 (9th Cir. Apr. 30, 1999).

9TH CIRCUIT: DENIED ASYLUM CASE REMANDED FOR FAILURE TO CONSIDER APPLICANT'S CREDIBILITY – The Ninth Circuit Court of Appeals has remanded an asylum case to the Board of Immigration Appeals because the latter failed to address the immigration judge's finding that the asylum applicant was not credible. The Ninth Circuit remanded the matter to the BIA for consideration of the petitioner's credibility.

The applicant, a Mr. Briones, had petitioned the Ninth Circuit to review a BIA decision denying his request for asylum and withholding of deportation. At Briones' deportation hearing, the IJ had made a specific finding that Briones' story was neither reliable nor credible. The BIA took note of the credibility finding but did not address it, stating, "[W]e do not reach the question of credibility because we find that the facts as alleged by [the applicant] do not demonstrate a well-founded fear of persecution." The Ninth Circuit disagreed and concluded that if Briones' testimony is accepted at face value, he makes a compelling case that he faces future persecution. The BIA, therefore, erred in bypassing the credibility issue.

In his application and testimony, Briones, a citizen of the Philippines, alleged that he had acted as a confidential informer for the Filipino armed forces and against the insurgent Communist New People's Army (NPA) on at least three occasions. He did so because he found the NPA's infliction of damage upon his village to be repulsive.

Allegedly, Briones gathered information about the NPA and provided it to a cousin who was a lieutenant in the military. The information led to two combat victories over the NPA, the deaths of NPA operatives, and the capture by the government of an important NPA leader.

Briones said that the NPA had discovered his role as a government informer, claiming that his name had appeared on an NPA death list. He also received a package wrapped with a black ribbon that included the political insignia of the Communists (a hammer and a sickle), which to Briones meant "death." The package may or may not have contained a note that said he would "be killed next," as Briones' testimony was hazy on this point. Briones further testified that the same cousin showed him a military intelligence report containing information about his appearance on the NPA's death list. Soon after, Briones fled the Philippines.

The Ninth Circuit disagreed with the BIA's conclusion that retaliation by the NPA against an informer working for the very government that the NPA was seeking to overthrow is not persecution on account of a protected status. The appeals court concluded, "Briones' active involvement in a fiercely ideological dispute between the government of the Philippines and the Communist NPA leads us inexorably to the conclusion on these facts

that the NPA surely attributed to him an adverse political point of view when they placed him on their assassination list and sent him a death threat." The court noted that the record contains no other reason why the NPA would want to eliminate Briones other than his contribution to their defeat in the field, the deaths of their combatants, and the capture of one of their leaders.

The court also rejected the BIA's finding that Briones' status as a well recognized artist in the Philippines and his fear of persecution being localized to his hometown undercut his claim of a well-founded fear of retribution. The Ninth Circuit rejected this analysis for four reasons.

First, the court concluded, the analysis is fatally colored by the BIA's erroneous view of the necessarily political nature of Briones' conduct, conduct which provoked an intention on the part of NPA to kill him. Second, the information that Briones gave to the military thwarted the NPA's tactical plans and resulted in the deaths of NPA operatives and the arrest of one of its commanders. A reasonable fact finder would be compelled to conclude that Briones' fear is not only subjectively real but also objectively well-founded. Third, any speculation about the NPA's intention evaporates if Briones' testimony regarding the appearance of his name on the NPA's assassination list and the information conveyed him by the lieutenant is found to be credible. Fourth, the NPA remains capable of killing its opponents.

Nevertheless, the court did not order the BIA to grant relief and instead remanded for consideration of the credibility issue. It noted that the record can still lead to the conclusion that the IJ was correct when he said, "[F]or all the reasons stated, the court has concluded that Briones' application is neither reliable nor credible." In remanding the matter, the court noted that although the BIA is free to determine its own method of processing asylum claims, the BIA might want to consider addressing, rather than bypassing, credibility problems. Conclusions stated in the alternative would normally relieve both the Ninth Circuit and the BIA of the delay and extra work caused when a remand is required.

Briones v. INS, __ F.3d __, 1999 WL 253190 (9th Cir. Apr. 30, 1999).

CORRECTION TO ARTICLE ON CASE HOLDING AGGRAVATED FELON NOT DEPORTABLE FOR PRE-ADAA CONVICTION – In the Apr. 30, 1999, issue of IMMIGRANTS' RIGHTS UPDATE, the article titled "11th Circuit Holds That Aggravated Felon Is Not Deportable Based on a Pre-ADAA Conviction" incorrectly refers to "1998" as the year of enactment of the Anti-Drug Abuse Act of 1988 (ADAA). Thus, the court's holding that individuals who were convicted of crimes prior to the enactment of the ADAA are not deportable as "aggravated felons" refers to convictions prior to the 1988 enactment of that law.

Employment Issues

INS EXPANDS ONE EMPLOYMENT ELIGIBILITY VERIFICATION PILOT AND STARTS ANOTHER – The Immigration and Naturalization Service has announced that it is expanding the Basic [Employment Eligibility Verification] Pilot Program to include the state of Nebraska and offering the Citizen Attestation Pilot Program to employers in the states of Arizona, Maryland, Massachusetts, Michigan, and Virginia. The INS published the notice regarding the Basic Pilot in the Federal Register on Mar. 19, 1999, and the one about the Citizen Attestation Pilot on Apr. 6, 1999.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) requires the attorney general to conduct three employment eligibility verification pilot programs. The programs are (1) the Basic Pilot, (2) the Citizen Attestation Pilot, and (3) the Machine-Readable Document Pilot. Participation in these programs is voluntary on the part of employers, except with regard to the executive and legislative branches of the federal government and certain employers found to be in violation of the Immigration and Nationality Act in states where a pilot is being conducted.

A joint project of the Social Security Administration (SSA) and the INS, the Basic Pilot started in November 1997. The program involves electronic verification checks of the SSA and INS data bases that uses an automated system to verify the employment authorization of all newly hired employees by referencing Social Security numbers and alien registration numbers. Verification checks are conducted for both U.S. citizens and noncitizens, and employers are required to attempt verification of employment eligibility by first accessing the SSA database. Only after employment eligibility cannot be confirmed with the SSA data base will employers be instructed to access the INS data base.

The Basic Pilot was originally offered to employers in California, Florida, Illinois, New York, and Texas. The IIRIRA requires that this pilot be conducted in five of the seven states with the highest estimated populations of undocumented aliens, and these five states meet this requirement. Via the March 1999 notice, the INS is advising employers in Nebraska that they may now elect to participate in the Basic Pilot. According to the INS, Nebraska has been chosen because the agency is conducting Operation Vanguard there. This is a program involving an industry-wide audit of the meatpacking industry in Nebraska as well as in parts of Iowa and South Dakota (see "INS Questions Nebraska Meatpacking Workers as Part of Operation Vanguard," p. 16).

The Citizen Attestation Pilot uses the same electronic verification system as the Basic Pilot to verify the employment authorization of newly hired employees. However, under the Citizen Attestation Pilot, employers verify employment eligibility only for newly hired *alien* employees. Furthermore, employers will conduct verification checks using only the INS data base, as this pilot does not involve SSA verification procedures. Normally, in completing Form I-9 (Employment Eligibility Verification), a new employee is required to present either a List A document, proving both identity and employment eligibility, or a combination of List B and List C documents, the former proving identity and the latter proving employment eligibility. However, under the Citizen Attestation Pilot, an employee attesting to U.S. citizenship who presents a List B identity document is not required to present *any* List C document demonstrating employment eligibility. The IIRIRA also provides for a special subset of the Citizen Attestation Pilot that will involve even less rigorous procedures for verifying employment authorization. Under this subset, when an employee attests to being a U.S. citizen, the employer will be required only to complete section 1 of the Form I-9. Furthermore, the employer will not be required to view *any* documents.

When the INS first published a notice in September 1997 regarding the pilot programs, employers in all fifty states were in-

vited to participate in the Citizen Attestation Pilot. But the INS reserved the right to limit the pilot to certain states based on the level of employer interest and on further determinations as to states' drivers' licensing procedures. The INS has now decided to limit its current invitation to participate in the Citizen Attestation Pilot to the states listed in the April 1999 notice (i.e., Arizona, Maryland, Massachusetts, Michigan, and Virginia.)

[64 Fed. Reg. 13,606 (Mar. 19, 1999) (Basic Pilot); 64 Fed. Reg. 16,751 (Apr. 6, 1999) (Citizen Attestation Pilot).]

INS QUESTIONS NEBRASKA MEATPACKING WORKERS AS PART OF OPERATION VANGUARD – As part of the Immigration and Naturalization Service's "Operation Vanguard," INS agents on May 5, 1999, went to the Lexington, Nebraska, plant of IBP, Inc., a meatpacking company, to question workers regarding their immigration status. Announced at a September 1999 meeting in Omaha, Operation Vanguard (originally called Operation Prime Beef) is an INS workplace enforcement strategy designed to remove and exclude undocumented workers from the meatpacking industry in Nebraska and Iowa.

The INS had previously reviewed the I-9 employment eligibility verification forms completed by the more than 2,000 workers at the Lexington plant and found "discrepancies" between the information provided by the workers and the information contained in INS, Social Security Administration (SSA), and other data bases. According to one newspaper account, the INS had identified 318 workers whose forms contained such discrepancies whom it wanted to interview at the Lexington plant. However, on the date the INS went to the plant, 185 of these workers were no longer on the payroll. The INS considered these workers to have "voluntarily terminated" their employment. Of the remaining 133 workers whose work papers contained discrepancies and who had been scheduled for interviews, 1 was arrested, 1 was fired, 8 were "no shows," 17 were on excused absences, and 106 were determined to be lawfully employed.

The next day, the INS went to another IBP plant in Gibbon, Nebraska. The INS had placed about 320 workers from this plant on a "discrepancy list," and of this group, 140 workers appeared for their INS interviews. All were cleared to continue working.

According to the INS, Operation Vanguard is intended to "remove the magnet" that draws undocumented workers to the Midwest—i.e., jobs. Rather than auditing the I-9 forms of meatpacking plants on a "piecemeal" basis, Operation Vanguard comprises an industry-wide audit of the meatpacking industry in Nebraska and western Iowa. (A few plants in South Dakota have also been targeted.) The strategy includes efforts by the INS to convince employers to participate in the electronic employment eligibility verification program known as the Basic Pilot Program (recently expanded to Nebraska—see "INS Expands One Employment Verification Pilot and Starts Another," p. 15) and the Social Security number verification program administered by the SSA known as Critical Links. Furthermore, after the initial audit of the meatpacking plants, the INS intends to follow-up with additional audits.

Last fall, the INS subpoenaed the I-9 forms and other employment records of all the meatpacking plants in Nebraska as well as parts of Iowa and South Dakota. The INS cross-referenced the information in these records against INS, SSA, and state and federal departments of labor databases to determine which of the workers had employment authorization.

In all, the INS reported identifying 40 plants that had workers with discrepancies between their work papers and the databases. Of the approximately 24,300 workers in these 40 plants, the INS reported that more than 4,700 of them had discrepancies in their work papers.

The INS placed the names of the workers whose work authorization could not be verified on discrepancy lists that were distributed to employers at another meeting in Omaha in April 1999. Subsequently, the employers set up interviews for workers identified on these discrepancy lists to meet with the INS and discuss their status. The INS also provided the employers a form letter to give to each of the workers on the lists. The letter advises each worker that the INS was not able to verify his or her employment authorization *without giving any specifics as to the problem*; states that INS will interview the worker at the work site; and informs the worker that, prior to the interview, he or she can contact the INS or the employer with additional documents or information that might clarify the worker's employment authorization.

After the employers delivered the form letters to the workers on the discrepancy lists, the INS initiated interviews at the meatpacking plants, beginning with the IBP plants in Lexington and Gibbon, Nebraska. Apparently, the INS expected few interviews would actually take place, believing that most of the workers identified with discrepancies would "voluntarily terminate." However, significant numbers of workers identified with discrepancies have appeared for their interviews in Lexington and Gibbon and at other plants that the INS has visited since May 5, 1999, and have been found to be authorized to work.

The INS will continue visiting meatpacking plants through late May and into June 1999 until it has gone to each of the 40 plants where workers with discrepancies in their work papers have been identified. And while Operation Vanguard is currently limited to Nebraska, Iowa and, South Dakota, that is likely to change, since the INS has indicated that it plans to expand the program to include other industries and states.

Immigrants & Welfare Update

STATE COURT INVALIDATES NEW YORK'S RESTRICTIONS ON IMMIGRANTS' ACCESS TO STATE-FUNDED MEDICAID *[by Claudia Schlosberg, National Health Law Program]* – A New York State Judge has ruled that a New York law that restricts immigrants' access to state-funded medical assistance violates the equal protection clauses of the United States and New York constitutions, as well as another provision of New York's constitution. The court's ruling restores medical assistance to individual immigrants who were denied medical assistance because they are persons residing in the U.S. under the color of law (PRUCOL) or are lawful permanent residents who entered the country after Aug. 22, 1996.

In New York, prior to enactment of the Personal Responsibility and Work Opportunities Reconciliation Act of 1996 (PRWORA), legal immigrants who were not eligible for federally-funded Medicaid were eligible for state-funded Medicaid benefits. After the PRWORA's passage, New York amended its law to eliminate state-funded medical assistance for immigrants except for Medicaid recipients who, as of Aug. 4, 1997, were either in a nursing home

or diagnosed with AIDS. The effect of the amendment to New York's law, coupled with the PRWORA, was to eliminate state-funded medical assistance for PRUCOLs and for lawful permanent residents who entered the country after Aug. 22, 1996. Noting that "Congress does not have the power to authorize the States to violate the Equal Protection Clause [of the U.S. Constitution]," the court ruled that restrictions on immigrants' access to state-funded medical assistance "discriminates against many legal immigrants and places vital public assistance benefits beyond their reach."

The case, *Aliessa v. Whalen*, Index Number 403748-98 (Preliminary Injunction Order, May 17, 1999), was brought in the names of eight individual plaintiffs by the Legal Aid Society of New York City, the Greater Upstate Law Project, and New York Legal Assistance Group. The plaintiffs' motion for class certification remains before the court. It is not known whether the state will appeal the court's ruling. For more information, contact lead counsels Elizabeth Benjamin at (212)577-3386 or Ellen Yacknin at (716)454-6500. A copy of the court's decision is posted on the NHeLP web site: http://www.healthlaw.org.

Temporary Protected Status: A Guide

May 1999 Edition

By Linton Joaquin, NILC, and Mark Silverman and Lisa Klapal, ILRC

The National Immigration Law Center (NILC) and the Immigrant Legal Resource Center (ILRC) announce publication of a timely new guide, *Temporary Protected Status.* Chapter 1 includes a discussion of the requirements of TPS as well as bars to eligibility. Chapter 2 focuses on the recently announced designations of Nicaragua and Honduras, for which the application deadline is July 5, 1999. This practitioner's handbook provides substantive guidance to quickly and appropriately respond to this pending deadline. Its appendices include the statute, relevant regulations, filing instructions, the application form, and a chart from the INS web page.

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