



Immigration Issues

ANTITERRORISM ACT EXPANDS DETENTION AND REMOVAL AUTHORITY, BENEFITS IMMIGRANTS HURT BY SEPT. 11 EVENTS – The antiterrorism law that Congress passed and President George W. Bush signed in October significantly expands the government’s arsenal of law enforcement tools, including its authority to monitor e-mail, individuals’ use of the Internet, and cell phone conversations. Title IV of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USAPATRIOT) Act of 2001, signed by the president on Oct. 26, 2001, provides for enhancing security along the U.S.’s northern border, expands the definition of “terrorism,” and mandates measures to facilitate data sharing among federal agencies

charged with preserving U.S. security. Also included in the law are humanitarian measures that preserve the lawful immigration status of individuals who lost relatives in the terrorist attacks of Sept. 11, 2001.

While the act’s provisions represent compromises by lawmakers and are scaled back from the original proposals set forth by the attorney general, they nevertheless represent bold new measures that must be vigilantly monitored. Below is a summary of the new law’s immigration provisions.

Additional Resources to the Northern U.S. Border. The new law triples the number of Border Patrol, Customs Service, and Immigration and Naturalization Service inspectors and adds \$50 million to the INS and U.S. Customs Services for improving technology and monitoring the border with Canada. It also waives the

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

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

cap on overtime for INS personnel.

Interagency Data Sharing. The new law requires the attorney general and the Federal Bureau of Investigation to share with the INS and State Dept. criminal history record information from the National Crime Information Center's Interstate Identification Index, Wanted Persons File, and other National Crime Information Center files. These records are to be used for determining whether visa applicants or applicants for admission have criminal histories.

The attorney general and State Dept. are mandated to develop and certify technology that can be used to verify the identity of persons applying for U.S. visas or seeking to enter the U.S. with visas. The new technology would be used for conducting background checks, confirming identities, and ensuring that persons have not received visas under different names.

Report on the Integrated Automated Fingerprint Identification System for Ports of Entry and Overseas Consular Posts. The attorney general must report to Congress on the feasibility of enhancing the FBI's Integrated Automated Fingerprint Identification System (IAFIS) and other identification systems. These systems would be used to better identify persons who hold foreign passports or visas who may be wanted in criminal investigations in the U.S. or abroad before visas are issued to them or they enter or exit the U.S.

Expansion of Terrorism Definition. The new law expands the definition of "terrorist" by adding new grounds of inadmissibility for representatives of foreign terrorist organizations that publicly endorse terrorist activity and that the secretary of State determines undermine U.S. efforts to reduce terrorist activity. Spouses and children of such non-U.S. citizens deemed inadmissible on terrorism-related grounds are also inadmissible, except for those who did not know or reasonably would not have known of the terrorist activity as well as spouses and children who have renounced terrorist activity.

The new law also accords the secretary of State unreviewable authority to designate as a "terrorist organization" any foreign or domestic group simply by publishing such a designation in the Federal Register.

One of the law's most controversial features is its expansion of the definition of "terrorist activity," which is a ground of inadmissibility and deportability. It expands the definition to include soliciting funds or providing material support to a group the secretary of State has designated as a terrorist organization, even if such contributions were made without intent to further terrorist goals.

Under the new law, soliciting funds and providing material support to terrorist organizations that are not officially designated are deportable offenses unless the contributor can prove that he or she did not know and should not reasonably have known that the solicitation would further the organization's terrorist activity. However, certain of the new grounds of inadmissibility do not apply to actions taken before the law's enactment with respect to a group that had not been designated as a terrorist organization by the secretary of State at the time.

Upon a consular officer's recommendation that there is no reasonable ground to believe a non-U.S. citizen knew or reasonably should have known that certain actions would further terrorist activity, the attorney general has discretion not to apply the new law against the individual outside the U.S. if his or her ac-

tions took place before Oct. 26, 2001.

Mandatory Detention of Suspected Terrorists. Another feature of the new law that has evoked considerable press attention is its mandatory detention provisions. The act authorizes the attorney general to certify a noncitizen as a terrorist if the attorney general has reasonable grounds to believe the individual is engaged in any activity that endangers the national security of the United States. Any noncitizen who the attorney general certifies as a terrorist may be taken into custody and must remain in custody until his or her removal from the U.S. The individual may be kept in custody irrespective of his or her eligibility for relief from removal. The attorney general's authority to certify a noncitizen as a terrorist may be delegated only to the deputy attorney general. The attorney general may detain a noncitizen certified terrorist up to seven days before charging him or her with a criminal offense. Failure to charge within that period requires the noncitizen's release from custody.

An noncitizen who is certified as a terrorist and detained and whose removal is unlikely in the reasonably foreseeable future may be detained for periods of up to six months. The individual must be detained if he or she threatens U.S. national security, the safety of the community, or any person.

The attorney general must review the individual's certification every six months. If he determines that the certification should be revoked, the attorney general may, unless prohibited by law, release the individual under certain conditions. Every six months, the detained individual may request in writing that the attorney general reconsider the certification; the detained individual may submit documents or other evidence in support of that request.

Judicial review of any decision concerning detention or certification is available in habeas corpus proceedings in any district court with jurisdiction. Appeals may be reviewed only by the Court of Appeals for the District of Columbia.

Six months after Oct. 26, 2001, and every six months thereafter, the attorney general must report to Congress on the number of noncitizens certified as terrorists; the grounds for the certifications; and the nationalities, length of detention, and number of persons certified who were granted any form of relief from removal, who were removed, or who the attorney general has determined should no longer be certified and who were released from detention.

Multilateral Cooperation against Terrorists. The law allows the State Dept. to provide, on a case-by-case basis, records to foreign governments in order to prevent, investigate, or punish acts of terrorism. Under prior law, such records were confidential and could be used only to formulate and enforce U.S. law.

Visa Integrity and Security. The new law states that it is the sense of Congress that an integrated entry and exit data system (tracking all entries to and exits from the country) should be fully implemented at airports, seaports, land borders, and ports of entry "with all deliberate speed and as expeditiously as practicable." It also requires the immediate establishment of an entry and exit data task force and authorizes funds for that purpose.

Congress foresees that the integrated entry and exit data system would rely on biometric technology and tamper-resistant documents. The system should also be able to interface with federal law enforcement databases so that individuals who pose a threat to the national security could be identified and detained.

Within 12 months of the act's enactment, the Office of Homeland Security must report to Congress on the information that U.S. agencies need to effectively screen visa applicants and applicants for admission to the U.S. in order to identify those affiliated with terrorist organizations or those that pose any threat to the security of the U.S.

Foreign Student Monitoring Program. The new law requires the attorney general to fully implement and expand the program established by section 641(a) of the Immigration and Nationality Act. Authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), section 641(a) requires the INS to collect information on students and other participants in the Visitors Exchange Program.

For each individual whose information is collected under section 641(a), the attorney general shall include information on the date of entry and port of entry. In addition, the term "educational institution" is amended to include any air flight school, language training school, or vocational school approved by the attorney general in consultation with secretaries of Education and State.

The law authorizes \$36,800,000 to the Justice Dept. for the period beginning on Oct. 26, 2001, and ending on Jan. 1, 2003, to fully implement and expand the enforcement of section 641(a).

Machine Readable Passports. The law requires that countries that are participants in the Visa Waiver Program have machine readable passports by the year 2003 rather than 2007, as required under prior law. INA § 217(c)(2)(B). It also allows waivers for nationals of countries that the attorney general finds are making progress towards meeting these requirements.

Each fiscal year until Sept. 30, 2007, the secretary of State must

- conduct annual audits of the implementation of the Machine Readable Passport Program;
- check for the implementation of precautionary measures to prevent the counterfeiting and theft of passports; and
- ascertain that countries designated under the visa waiver program have established a program to develop tamper-resistant passports.

Upon one year of enactment and every year until 2007, the secretary of State must report to Congress on the findings of the most recent audit.

Prevention of Consulate Shopping. Under the new law, the secretary of State must review how consular officers issue visas to determine if "consulate shopping"—i.e., the practice of seeking out a consulate that will issue the applicant a visa when other consulates have declined to issue a visa—is a problem. If consulate shopping is identified as a problem, the secretary of State must take corrective steps to address it and report to Congress on any actions taken.

Provisions Benefiting Persons Whose Immigration Process Was Affected by the Events of Sept. 11, 2001. The new law provides that the attorney general may grant special immigrant status to non-citizens who were beneficiaries of a family- or employment-based visa petition, fiance(e) visa petition, or labor certification filed on or before Sept. 11, 2001, whose petitions were revoked, terminated, or rendered null before or after approval due to the death or disability of the petitioner, applicant, or principal beneficiary, or the physical damage or destruction of the petitioner's or applicant's business as a direct result of terrorist attack.

Spouses and children who were accompanying or following

to join a principal beneficiary also qualify for this status, even if the principal beneficiary has died. In addition, grandparents of children whose U.S. citizen or lawful permanent resident parents died as a direct result of the Sept. 11 terrorist activity also qualify for special immigrant status. The public charge ground of inadmissibility will not apply to these special immigrants.

The law contains a number of provisions to extend status and filing deadlines for nonimmigrants affected by the events of Sept. 11. The status of nonimmigrants who were disabled as a direct result of the Sept. 11 terrorist activity and were lawfully present in the U.S. on Sept. 10, 2001, is extended until the date the status would have terminated if the new law had not been enacted or one year after the death or onset of disability, whichever comes later. Lawful nonimmigrant status of spouses and children of principal nonimmigrants who died as a result of the terrorist attacks is also extended for one year. Nonimmigrants who qualify for this one-year extension are also to be provided employment authorization.

Nonimmigrants who were lawfully present in the U.S. on Sept. 10, 2001, and who were prevented from filing a timely application for an extension or change of status as a direct result of terrorist activity are granted a 60-day extension to file these applications.

A nonimmigrant who was lawfully present in the U.S. on Sept. 10, 2001, who was unable to timely depart the U.S. as a direct result of terrorist activity will not be considered to have been unlawfully present in the U.S. during the period beginning on Sept. 11, 2001, and ending on the date of the individual's departure, if such departure occurs on or before Nov. 11, 2001.

A nonimmigrant who was in lawful status on Sept. 10, 2001, but not present in the U.S. on that date who was prevented, as a direct result of terrorist activity, from returning to the U.S. in order to file a timely application for an extension of nonimmigrant status will be considered to have timely filed an application if it is filed no later than 60 days after it was due.

A nonimmigrant who was in lawful status on Sept. 10, 2001, but not present in the U.S. on that date and who, due to terrorist activity, could not return to the U.S. to file an application to extend nonimmigrant status may remain lawfully in the U.S. in the same nonimmigrant status until the date such lawful nonimmigrant status would have terminated or 60 days after the date the extension should have been filed, whichever comes later.

The law defines circumstances preventing an individual from acting in a timely way to include office closures; mail or courier service cessations; closures, cessations, or delays affecting case processing; and delays in travel that is necessary to satisfy legal requirements.

Winners of the diversity lottery who were required to enter the U.S. by Sept. 30, 2001, and were unable to do so because of terrorist attacks may enter or adjust status by Apr. 1, 2002. If visa numbers under the 2001 program have been exceeded by that time, such diversity lottery winners must be counted under the 2002 program.

If a principal beneficiary of the visa lottery died as a result of terrorist activity, the principal's spouse and children will be eligible for permanent residence under the program until June 30, 2002. However, the ceiling placed on the number of diversity immigrants may not be exceeded.

A person with an immigrant visa who was unable to enter the

U.S. as a direct result of terrorist activity and whose visa expires before Dec. 31, 2001, will have an extension until that date unless a longer period is otherwise provided under the new law.

A noncitizen granted parole that expired on Sept. 11, 2001, who, as a result of terrorist activity, was unable to return to the U.S. prior to the expiration date, is extended parole for an additional 90 days.

Voluntary departure that began on Sept. 11, 2001, and ended on Oct. 11, 2001, is extended for an additional 30 days.

Humanitarian Relief for Certain Surviving Spouses and Children. A noncitizen whose U.S. citizen spouse died as a result of terrorist activity will remain an immediate relative after the citizen's death, provided they were not legally separated at the time of the citizen's death and the noncitizen files a family visa petition within two years of the citizen's death. Unlike under prior law, the marriage need not have existed for two years prior to the death of the U.S. citizen spouse.

A noncitizen child of a U.S. citizen who died due to terrorist activity will remain an immediate relative after the date of the citizen's death regardless of changes in age or marital status thereafter, but only if the noncitizen files a petition within two years after such date.

Any spouse, child or unmarried son or daughter of a lawful permanent resident who died due to the Sept. 11, 2001, terrorist activity and was included in a family visa petition filed by the LPR before that date and had not been admitted or approved for lawful permanent residence by that date will continue to be considered a valid petitioner for preference status and will remain eligible for lawful permanent status and have the same priority date as that assigned prior to the petitioner's death. The individual need not file a new petition. In addition, the spouse, child, son, or daughter may be eligible for deferred action and work authorization.

If a spouse, child, or unmarried son or daughter of a person who was an LPR on Sept. 11, 2001, and who died as a result of that day's terrorist activity was not a beneficiary of a family visa petition, he or she may self-petition with the INS if he or she was present in the U.S. on Sept. 11, 2001. Such a spouse, child, son, or daughter may be eligible for deferred action and work authorization.

If a principal beneficiary of an employment-based visa petition died due to the Sept. 11 terrorist activity, an individual who applied for adjustment of status as the spouse or child of that person may have the adjustment application adjudicated as if that death had not occurred.

The public charge grounds of inadmissibility do not apply to determine the admissibility of an immigrant accorded a benefit under the provisions for surviving spouses and children summarized herein.

A noncitizen whose twenty-first birthday occurred in Sept. 2001 who is the beneficiary of a petition or application filed before Sept. 11, 2001, will be considered a child 90 days after his or her twenty-first birthday for purposes of adjudicating the petition or application. A noncitizen whose twenty-first birthday occurs after Sept. 2001 who is the beneficiary of a petition or application filed under the INA on or before Sept. 11, 2001, will be considered to be a child for 45 days after his or her twenty-first birthday for purposes of adjudicating the petition or application.

For humanitarian purposes or to ensure family unity, the attorney general may provide temporary administrative relief to any

noncitizen who was lawfully present in the U.S. on Sept. 10, 2001, and who on that date was the spouse, parent, or child of an individual who died or was disabled as a direct result of a specified terrorist activity.

The attorney general is directed to establish standards for evidence demonstrating that death, disability, or loss of employment due to physical damage or destruction of business occurred as a direct result of terrorist activity. The law waives promulgation of regulations and directs the attorney general to carry out the law as expeditiously as possible.

The law defines "terrorist activity" to include the events of Sept. 11, 2001, and states that nothing in the law will be construed to provide any benefit or relief to any individual culpable of terrorist activity. Nor will any benefits be provided to any family member of such an individual.

AG EXPANDS AUTHORITY TO SEGREGATE DETAINEES AND MONITOR THEIR COMMUNICATIONS WITH ATTORNEYS

–Attorney General John Ashcroft has issued a final rule, effective Oct. 30, 2001, that expands the authority of the director of the Bureau of Prisons (BOP), and the heads of all other components of the U.S. Dept. of Justice that have custody of individuals, to impose "special administrative measures" to limit and monitor communications of certain detainees. These measures may be imposed against detainees who are considered to pose a risk of disclosing classified information and against detainees who are identified as posing a risk that their communications or contacts with other persons could result in death or serious bodily injury. The rule expands existing regulations by allowing the attorney general to designate the need for such special administrative measures for periods of up to one year, rather than 120 days, and by extending these measures beyond the BOP to all components of the Justice Dept. that detain individuals. The rule also authorizes monitoring of communications between detainees and their attorneys without a warrant, where the attorney general so orders.

Regulations currently provide that the director of the BOP may impose special administrative measures against a detainee where the head of a U.S. intelligence agency certifies to the attorney general that there is a danger that the detainee will disclose classified information that if disclosed would pose a threat to national security. 28 C.F.R. § 501.2. Current regulations also authorize the director of the BOP to impose such measures upon written notification by the attorney general or the head of a federal law enforcement or intelligence agency that there is a substantial risk that a prisoner's communications or contacts with others could result in death or serious injury to persons or substantial damage to property also entailing a risk of death or serious bodily injury. 28 C.F.R. § 501.3. These special measures can include administrative detention and/or limiting correspondence, visitation, interviews with news media, and use of the telephone. They may be imposed for up to 120 days and may be re-imposed for additional 120-day periods only if the attorney general or other authorized official gives written notification that the circumstances originally identified continue to exist.

The new rule expands the authority to impose these special administrative measures in several ways. First, in place of the 120-day limitation, the measures now may be imposed for a period of up to one year and re-imposed for additional one-year

periods. Second, the measures may be re-imposed even if the circumstances that warranted the initial action no longer exist, as long as there continues to be a danger that would warrant imposing the measures. Third, the rule grants the same authority to impose these measures held by the BOP director to the commissioner of the Immigration and Naturalization Service, the director of the U.S. Marshals Service, and other "appropriate officials of the Department of Justice having custody of persons for whom special administrative measures are required."

The new rule also authorizes the monitoring of communications between detainees and their attorneys without a warrant, where the attorney general orders such monitoring based on information provided by the head of a federal law enforcement or intelligence agency. That information must indicate "that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism." Unless the monitoring has been authorized by a court, the director of the agency having custody of the detainee must provide written notice to the detainee and the attorneys involved explaining that their communications may be monitored. The rule provides that, in order "to protect the attorney-client privilege," a "privilege team" is to be formed "consisting of individuals not involved in the underlying investigation." The rule further provides: "Except in cases where the person in charge of the privilege team determines that acts of violence or terrorism are imminent, the privilege team shall not disclose any information unless and until such disclosure has been approved by a federal judge." The supplementary information to the rule explains that communications to attorneys that further illegal acts are not privileged, and "it is intended that the use of a taint team and the building of a firewall will ensure that the communications which fit under the protection of the attorney-client privilege will never be revealed to prosecutors and investigators." As with the other provisions of the proposed rule, the monitoring of attorney communications applies to individuals detained by any component of the DOJ that has custody of detainees.

The final rule took effect on Oct. 30, 2001; written comments to the rule must be submitted on or before Dec. 31, 2001.

66 Fed. Reg. 55,062-66 (Oct. 31, 2001).

AG ISSUES INTERIM RULE TO EXPAND USE OF AUTOMATIC STAYS OF IJ DECISIONS ORDERING RELEASE FROM DETENTION

– Attorney General John Ashcroft has issued an interim rule, effective immediately, that expands the circumstances in which the Immigration and Naturalization Service can invoke an automatic stay of a decision by an immigration judge to release a non-U.S. citizen from detention. Under the new rule, the INS can invoke an automatic stay in any case where the INS originally decided against release on bond or set a bond in excess of \$10,000 and the IJ then orders release, with or without bond.

Previously, regulations of the Executive Office for Immigration Review (EOIR) provided that automatic stays were available to the INS only where a noncitizen is subject to mandatory detention because of criminal convictions or terrorist grounds. In order to invoke an automatic stay, the INS was required to file a Notice of Service Intent to Appeal Custody Redetermination (Form EOIR-43) with the immigration court on the day of the IJ's ruling. If the INS then failed to file a notice of appeal within thirty days of

the bond redetermination ruling, the stay would lapse; otherwise, it would remain in effect until the Board of Immigration Appeals resolved the appeal. 8 C.F.R. § 3.19(i)(2).

The new rule revises the EOIR regulations to allow the INS to invoke an automatic stay in cases not subject to mandatory detention. The rule also modifies the procedures applicable to automatic stays. In order to invoke the automatic stay, the INS must file Form EOIR-43 "within one day" of the IJ's bond redetermination decision, and the automatic stay lapses unless the INS files a notice of appeal within 10 days of the decision. If the INS files an appeal, the stay continues in effect until the BIA rules on the appeal. If the BIA orders release, under the new rule the automatic stay continues in effect for a further five business days. If within these five days the INS commissioner certifies the BIA's order to the attorney general for review, then the stay continues in effect until the attorney general decides the case.

The interim rule took effect on Oct. 29, 2001. Written comments to be considered in development of a final rule must be submitted on or before Dec. 31, 2001.

66 Fed. Reg. 54,909 (Oct. 31, 2001).

INS ISSUES INSTRUCTIONS FOR LIBERIAN DED APPLICANTS – In our last issue of IMMIGRANTS' RIGHTS UPDATE, we reported that President George W. Bush had authorized deferred enforced departure (DED) for qualified Liberians until Sept. 29, 2002. On Oct. 16, 2001, the Immigration and Naturalization Service announced that it would defer the deportation or removal of qualified Liberians present in the U.S. and provided instructions on how they could apply for this relief. DED allows qualified Liberians to remain in the U.S. and obtain work authorization. The INS instructions and Liberian DED supplemental form differ from the presidential order in one significant respect: whereas the order extends DED to all nationals of Liberia present in the U.S. "as of September 29, 2001," with certain exceptions, the INS form and instructions require individuals to have been present in the U.S. as of Sept. 29, 1999. The INS instructions for filing are reviewed below.

Employment Authorization. To obtain employment authorization, qualified Liberian nationals will need to file Form I-765, Application for Employment Authorization, and Form I-765D, Liberian DED Supplemental to Form I-765, with the district office that has jurisdiction over the applicant's place of residence. The filing fee for work authorization applications is waived for DED recipients. However, all first-time applicants will be required to submit the standard \$25 fingerprint fee.

The INS instructions direct its district directors to take steps to process DED-related employment authorizations immediately so as to avoid lapses in work authorization.

Establishing Eligibility for Work Authorization. To establish their eligibility for work authorization, applicants must submit a copy of the following documentation, if available:

- Form I-94, Arrival Departure Record
- Most recent employment authorization document
- Photo identification card or a school identification card
- Two photographs of the applicant

If these documents are unavailable, applicants must submit an affidavit affirming their Liberian nationality. The INS instructions state that they must also attest that they were present in the U.S. as of Sept. 29, 1999, and are eligible for DED. The INS will inter-

view applicants to assess their eligibility.

The instructions note that while DED is automatic for qualified Liberians, there are some exceptions to eligibility under this program. These exceptions apply to persons:

- who are ineligible under section 244(c)(2)(B) of the Immigration and Nationality Act (persons who have committed a felony or two or more misdemeanors or are barred from asylum under INA section 208(b)(2) (persecutors of others; persons who have been convicted of certain crimes or who are security risks));
- whose removal is in the best interest of the U.S.;
- whose presence or activities in the U.S. the secretary of State has reasonable grounds to believe would have potentially serious adverse foreign policy consequences for the U.S.;
- who voluntarily returned (or return) to Liberia or their country of last habitual residence outside the U.S.;
- who were deported, excluded or removed before the date of the memo; or
- who were subject to extradition.

TPS EXTENDED FOR MONTSERRAT AND REDESIGNATED FOR SOMALIA

– In two separate notices, Attorney General John Ashcroft has extended temporary protected status (TPS) for an additional year to nationals of Montserrat and extended and redesignated TPS for Somalians. The designation for Somalians is effective from Sept. 17, 2001, until Sept. 17, 2002, and the effective period for nationals of Montserrat is from Aug. 27, 2001, until Aug. 27, 2002. The notice to redesignate TPS for Somalians allows individuals who have been continuously present in the U.S. since Sept. 4, 2001, to apply for TPS.

The Immigration and Nationality Act authorizes the attorney general to grant TPS to individuals in the United States who are nationals of countries that are experiencing armed conflict, environmental disaster, or other extraordinary and temporary adverse conditions. TPS may also be granted to individuals of no nationality who last habitually resided in a country whose nationals are eligible for TPS. The attorney general has determined that civil conflict continues in Somalia and hazardous volcanic activity persists in Montserrat such that extensions of TPS are warranted for eligible people from both countries.

To maintain TPS and work authorization, nationals of either country must reregister during the designated 90-day period. For nationals of Montserrat, that period began on Aug. 3, 2001, and ended Nov. 1, 2001. For Somalians, the period runs from Sept. 4, 2001, until Dec. 3, 2001.

To reregister for the extension, applicants must submit the following:

- Form I-821
- Form I-765 (Application for Employment Authorization)
- Two identification photographs (1 ½" x 1 ½")

An applicant must file both forms with the local Immigration and Naturalization Service district office that has jurisdiction over the applicant's place of residence. If the applicant wishes only to reregister and does not want work authorization, a filing fee is not required. However, all applicants seeking an extension of work authorization must submit the \$100 filing fee with the work authorization application. Applicants may request a fee waiver in accordance with the regulations (8 C.F.R. § 244.20). All forms are available from the toll-free INS Forms Line, 1-800-870-3676, or

from the INS web site, www.ins.gov.

Applicants for TPS do not need to submit new fingerprints or the accompanying \$25 fee. Children who are TPS beneficiaries and who have reached the age of 14 but were not previously fingerprinted must pay the \$25 fingerprint fee with their application for extension.

Under the redesignation, first-time Somalian applicants must pay a fee of \$50 with Form I-821 and \$100 with Form I-765. Applicants who do not want work authorization need not submit the \$100 fee but must still submit the Form I-765.

TPS registrants who need to travel outside the U.S. during the coming year must receive "advance parole" from their local INS office prior to departing the country. Failure to do so may jeopardize their ability to be allowed back into the U.S. Advance parole allows individuals to travel abroad and return to the U.S. and is issued on a case-by-case basis. Individuals who are granted TPS may apply for advance parole by filing Form I-131 at their local INS district office. However, individuals who have accrued more than 180 days of unlawful presence in the U.S. should not travel abroad because even with advance parole they will be subject to the 3- or 10-year "unlawful presence" bars to admission when they seek to return to the U.S.

Some nationals of Montserrat may qualify for late initial registration for TPS under 8 C.F.R. section 244.2(f)(2). To apply for late initial registration, applicants must:

- be a national of the designated country;
- have been "continuously physically present" in the U.S. since the original designation (Aug. 28, 1997);
- have continuously resided in the U.S. since Aug. 22, 1997;
- be admissible as an immigrant except as provided under INA section 244(c)(2)(A);
- not be ineligible under INA section 244(c)(2)(B) (i.e., they must not have committed a felony and two misdemeanors in the U.S. or be ineligible for admission under INA section 208(b)(2), which bars persecutors of others, persons who have committed certain crimes, and security risks).

An applicant from Montserrat must also show that during the initial registration period (Aug. 28, 1997, through Aug. 27, 1998) he or she

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

An applicant for late initial registration must enroll no later than 60 days from the expiration of the application period.

66 Fed. Reg. 46,288–90 (Sept. 4, 2001) (Somalia);
66 Fed. Reg. 40,834–35 (Aug. 3, 2001) (Montserrat).

BIA: CALIFORNIA PERJURY CONVICTION IS AGGRAVATED FELONY – The Board of Immigration Appeals has issued a unanimous en banc precedent decision finding that a California conviction for perjury constitutes an aggravated felony under section 101(a)(48)(S) of the Immigration and Nationality Act. The decision upholds an immigration judge's decision finding a lawful permanent resident

Salvadoran respondent removable and ineligible for any relief from removal as a result of an aggravated felony conviction.

The respondent in this case, a Mr. Martinez-Recinos, adjusted to LPR status in 1990. In December 1998, he was convicted of perjury under section 118(a) of the California Penal Code and sentenced to two years' incarceration. The Immigration and Naturalization Service then initiated removal proceedings against Martinez-Recinos based on the conviction.

At his hearing, the immigration judge ruled that Martinez-Recinos was removable as an aggravated felon and not eligible for adjustment of status. Martinez-Recinos appealed, contending that his conviction is not an aggravated felony and that his application for a 212(h) waiver should have been considered in conjunction with his application for adjustment of status.

The BIA began its consideration of the appeal by examining subsection (S) of the "aggravated felony" definition of INA section 101(a)(48). Subsection (S) applies to "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." The BIA then compared the California statute under which Martinez-Recinos was convicted with the federal statute defining the crime of perjury in order "to determine whether the state law shares common material elements with the federal law." The California statute applies to persons who, "having taken an oath" to "testify, declare, depose, or certify truly" in any case where an oath may by California law be administered, or having declared or certified under penalty of perjury in any case where such declaration or certification is permitted by California law, "willfully states as true any material matter which he or she knows to be false." The BIA concluded that the federal statute defining perjury, 18 U.S.C. section 1621 (1994), contains essentially the same requirements. The BIA therefore concluded that the California conviction is a crime of perjury.

In reaching this conclusion, the BIA considered the respondent's contention that the California statute is divisible and that the BIA therefore must examine the record of conviction to determine whether the conviction is an aggravated felony. However, the BIA found that although the statute contains several parts, each of those parts constitutes perjury as defined by the federal statute, so that there was no need to look further into the record of conviction.

The BIA also upheld the IJ's conclusion that the perjury offense is a crime of moral turpitude, rendering Martinez-Recinos ineligible for adjustment of status without a 212(h) waiver. And the BIA agreed with the INS that Martinez-Recinos is ineligible for a 212(h) waiver because he was previously admitted to the U.S. as an LPR and has been convicted of an aggravated felony. For these reasons, the BIA dismissed the appeal.

Matter of Martinez-Recinos, 23 I. & N. Dec. 175, Int. Dec. #3456 (BIA Oct. 15, 2001).

BIA: IN ABSENTIA REMOVAL ORDER MAY NOT BE ENTERED WHERE THE RECORD REFLECTS THAT RESPONDENT DID NOT RECEIVE MAILED NTA –

The Board of Immigration Appeals has issued an en banc precedent decision upholding an immigration judge's order terminating removal proceedings in the case of a respondent who failed to appear at her removal hearing. The BIA dismissed the appeal of the Immigration and Naturalization Service, which contended

that the IJ should have entered an in absentia order of removal. The BIA found that, where notice of a removal hearing was served by mail and the respondent failed to appear, an in absentia order may be entered only where the respondent received, or can be charged with receiving, a Notice to Appear (NTA) informing him or her of the obligation to provide the immigration court with a current address.

The respondent in this case is a Salvadoran national who entered the U.S. in March 1982 and two months later applied for asylum. In June 1991, she submitted an address report card to the INS to inform the agency of her current address. In 1997, the INS mailed her a notice for an asylum interview, but she failed to appear for the interview. The INS then sent the respondent, by certified mail addressed to her last known address, an NTA for a removal hearing scheduled for Sept. 30, 1997. The NTA was returned to the INS by the Postal Service as undeliverable.

When the respondent failed to appear at the Sept. 1997 removal hearing, the IJ offered to administratively close the case to allow the INS to serve the NTA again, but the INS insisted on proceeding with the case and argued that the IJ should enter an in absentia removal order. However, the IJ found that the record did not establish that the respondent had received the NTA or been informed of the removal proceedings and the obligation to keep the court informed of her current address. The IJ then terminated proceedings, and the INS appealed. The IJ's order was sent by certified mail to the respondent's last-known address and returned with the notation "Moved Left No Address."

On appeal, the INS contended that the IJ should have entered an in absentia order, asserting that because section 239(a) of the Immigration and Nationality Act authorizes service of the NTA by regular mail (where personal service is not practicable), the method of notice used in this case should be considered adequate to support an in absentia order. The INS also relied on INA section 265, which imposes a duty on all noncitizens to notify the INS of any change of address.

The BIA rejected these contentions, finding that a careful reading of all the relevant statutory provisions shows that an in absentia order cannot be entered where the record reflects that the respondent never received the NTA and was never informed of the address obligations associated with removal proceedings. Section 239(a)(1)(F) of the INA requires that NTAs contain certain information, including notice that the respondent must provide the attorney general with a current address and telephone number (if any) where he or she may be contacted regarding removal proceedings, notice that the respondent must notify the attorney general of any change of address, and notice of the consequences of failing to provide this information. A respondent must be properly served with an NTA in order for these address obligations to be established and for the IJ to be authorized to proceed in absentia. While the statute allows for service of the NTA by regular mail, it also specifically provides that "[s]ervice by mail . . . shall be sufficient if there is proof of attempted delivery to the last address provided by the alien *in accordance with subsection (a)(1)(F)*." INA § 239(c) (emphasis supplied in BIA decision). Similarly, the statute authorizes the IJ to enter an in absentia order if a respondent fails to appear for a removal hearing after having been provided written notice, and such notice is considered sufficient "*if provided at the most re-*

cent address provided under section 239(a)(1)(F).” INA § 240(b)(5)(A) (emphasis supplied in BIA decision).

Based on these provisions, the BIA found that “in cases where the hearing notice is sent by mail, the entry of an in absentia order is authorized when the alien has been given written notice of the removal hearing ‘at the most recent address provided under section 239(a)(1)(F)’” (quoting INA § 240(b)(5)). The BIA concluded that “an address can be a section 239(a)(1)(F) address *only* if the alien has first been informed of the particular statutory address obligations associated with removal proceedings and of the consequences of failing to provide a current address” (emphasis in original). The BIA noted that in some cases a respondent can be charged with having received mailed notice, as where there is evidence that the notice reached a respondent’s household. In this case, however, since the record shows that the respondent was never given notice of the address obligations, there was no section 239(a)(1)(F) address that would justify entering an in absentia order based on mailed notice.

The BIA rejected the INS’s contention that the registration requirements of INA section 265(a), which impose a duty on non-citizens to report address changes to the attorney general, allow for entry of an in absentia order after mailed service of an NTA to the last address reported to the INS. While the INA imposes certain consequences for failing to comply with section 265(a), including a possible misdemeanor conviction, it does not include the entry of an in absentia removal order as one of these consequences. The BIA therefore upheld the IJ’s termination of proceedings and dismissed the appeal. *Matter of G-Y-R-*,

23 I. & N. Dec. 181, Int. Dec. #3458 (BIA Oct. 19, 2001).

BIA HOLDS THAT SALVADORAN CONSTITUTION LEGITIMATED CHILDREN BORN OUT OF WEDLOCK ON OR AFTER DEC. 16, 1965, FOR PURPOSES OF VISA ELIGIBILITY – The Board of Immigration Appeals has issued a unanimous en banc precedent decision finding that all children born out of wedlock in El Salvador on or after Dec. 16, 1965, are considered “legitimated” because of a constitutional provision enacted in 1983. The decision was issued on review of a denial of a family first preference visa petition by the director of the Vermont Service Center (VSC).

The VSC director denied the petition under *Matter of Ramirez*, 16 I. & N. Dec. 222 (BIA 1977), which held that Salvadoran law allowed children born out of wedlock to be acknowledged by the parents’ act of registering the child’s birth or legitimated by the marriage of the parents before the child turns 18 years of age. In this case, the naturalized citizen petitioner sought to immigrate a daughter born out of wedlock who had not been legitimated by any of the actions recognized in *Ramirez* before her eighteenth birthday. However, while the VSC director denied the petition, he also certified his decision to the BIA for review, noting that El Salvador had eliminated the distinction between legitimate and illegitimate children in a constitutional provision enacted in 1983.

On review, the BIA concluded that all children born out of wedlock who were under 18 years of age at the time the 1983 constitutional provision was enacted must be considered to have been legitimated. Children born out of wedlock before Dec. 16, 1983, must continue to meet the legitimation requirements of *Matter of Ramirez*.

Matter of Moraga, 23 I. & N. Dec. 195, Int. Dec. #3459 (BIA Oct. 19, 2001).

BIA VACATES PRIOR DECISION IN MATTER OF CRAMMOND – The Board of Immigration Appeals has issued a precedent decision vacating its previous decision in *Matter of Crammond*, 23 I. & N. Dec. 9 (BIA 2001). In that decision the BIA granted the respondent’s motion to reopen, finding that he was no longer convicted of an aggravated felony because his state conviction for sexual intercourse with a minor had been reduced to a misdemeanor by the state criminal court (for details, see “BIA: State Conviction for Unlawful Sexual Intercourse with a Minor That Has Been Reduced to a Misdemeanor Is Not an ‘Aggravated Felony,’” IMMIGRANTS’ RIGHTS UPDATE, May 10, 2001, p. 6). The BIA has now granted the motion for reconsideration of the Immigration and Naturalization Service and vacated the prior decision.

This action does not reflect a reconsideration of the merits of the decision but rather was taken because the INS brought to the attention of the BIA the fact that the respondent left the U.S. prior to the BIA’s ruling. Under the regulations (8 C.F.R. § 3.2(d)), any departure from the U.S. after a motion to reopen or to reconsider has been filed constitutes a withdrawal of the motion. Because the motion was withdrawn, the BIA had no jurisdiction to rule on it, and for this reason the BIA is now vacating the decision.

Matter of Crammond, 23 I. & N. Dec. 179, Int. Dec. #3457 (BIA Oct. 16, 2001).

Litigation

9TH CIRCUIT ORDERS BIA TO ADJUDICATE SUSPENSION CASE UNDER PRE-IIRIRA LAW WHERE IJ PROPERLY GRANTED SUSPENSION AND INS APPEAL WAS MERITLESS – The Ninth Circuit Court of Appeals has reversed a ruling of the Board of Immigration Appeals denying suspension of deportation based on the “stop-time” rule. The court based its decision on the fact that the petitioner was properly granted suspension of deportation by an immigration judge before the effective date of the stop-time rule, and the Immigration and Naturalization Service appeal from that decision contending that the stop-time rule did apply was without merit and simply for purposes of delay. The BIA did not rule on the appeal until after the Apr. 1, 1997, effective date of the stop-time rule, when it held that because of the rule the petitioner was no longer eligible for suspension. On petition for review of that decision, the Ninth Circuit concluded that to deny suspension based on a meritless appeal would contravene Congress’s intent in enacting the stop-time rule with a six-month delay in its effective date.

The stop-time rule was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The rule prohibits counting time that an immigrant is present in the United States after he or she is served with a Notice to Appear (NTA) commencing removal proceedings towards meeting the “continuous physical presence” requirement of cancellation of removal. In *Ram v. INS*, 243 F.3d 510 (9th Cir. 2001), the court upheld the BIA’s determination that the stop-time rule applies to the calculation of the seven-year continuous physical presence requirement for suspension of deportation and that Orders to Show Cause (OSCs) served prior to the enactment of the IIRIRA stop the accumulation of time towards meeting this requirement for purposes of suspension (see “9th Circuit Decides ‘Stop-Time’ Rule Applies to Suspension Cases, Bars Accumulating Time after Issuance of OSC,” IMMIGRANTS’ RIGHTS UPDATE, Feb. 28,

2001, p.11).

Although the IIRIRA was enacted on Sept. 30, 1996, Congress delayed implementation of many of its provisions for six months, and the stop-time rule took effect only on Apr. 1, 1997. *Astrero v. INS*, 104 F.3d 264 (9th Cir. 1996). The Ninth Circuit previously has recognized several circumstances in which cases that reached the BIA on appeal after this date nonetheless should have been adjudicated based on pre-IIRIRA law. In *Castillo-Perez v. INS*, 212 F.3d 518 (9th Cir. 2000), the court ruled, in the case of a petitioner whose suspension application was not adjudicated before the enactment of the IIRIRA because of ineffective assistance of counsel, that the application must be adjudicated under pre-IIRIRA law. In *Guadalupe-Cruz v. INS*, 240 F.3d 1209 (9th Cir. 2000), an immigration judge denied suspension prior to Apr. 1, 1997, based on the stop-time rule, despite the Ninth Circuit's ruling that the rule was not yet in effect, and the court ruled that the application must be adjudicated under pre-IIRIRA law. And in *Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999) and 236 F.3d 1115 (9th Cir. 2001) (supplemental ruling), the court upheld an injunction prohibiting the deportation of individuals whose suspension applications could have been granted prior to Apr. 1, 1997, but for directives issued by the chief immigration judge and the chair of the BIA that prohibited IJs and the BIA from granting suspension cases during two months prior to Apr. 1, 1997, because these officials believed further grants might exceed a 4,000-per year cap that was enacted as part of the IIRIRA (see "9th Circuit Affirms Preliminary Injunction in Class Action Case for Suspension Applicants," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2001, p. 10). The most recent decision establishes another circumstance requiring adjudication under pre-IIRIRA law.

Otarola v. INS, ___ F.3d ___, No. 99-71405 (9th Cir. Oct. 18, 2001).

9TH CIRCUIT FINDS INS CAN REINSTATE REMOVAL ORDER AFTER VOLUNTARY DEPARTURE; TRANSFERS CASE TO DISTRICT COURT TO RESOLVE FACTUAL ISSUES – The U.S. Court of Appeals for the Ninth Circuit has ruled that the reinstatement of removal statute—section 241(a)(5) of the Immigration and Nationality Act—allows the Immigration and Naturalization Service to “reinstated” removal orders for individuals who previously left the U.S. pursuant to a grant of voluntary departure as well as for those who were deported. The court distinguished between voluntary departure granted in proceedings, which can trigger reinstatement, and voluntary departure granted prior to proceedings, which cannot. On review of a reinstated order in this case the court also found that it could transfer the case to federal district court to resolve disputed factual issues.

The petitioner in this case, a Mr. Gallo, was put in deportation proceedings in Alaska in 1992. He applied for suspension of deportation but was denied by the immigration judge, in part because the IJ considered that he had other relief available (he planned to marry his girlfriend of four years, a recently-naturalized U.S. citizen). The IJ granted him 60 days' voluntary departure, and Gallo appealed to the Board of Immigration Appeals. Shortly after filing the appeal, Gallo married his girlfriend, and she filed a visa petition on his behalf. He may have filed an adjustment application with the INS, but he did not move to remand his deportation case to apply for adjustment with the Executive Of-

fice for Immigration Review. In January 1997, while the appeal to the BIA was still pending, Gallo went to Mexico because his father was dying. Although he had an attorney, his attorney did not warn him that leaving the U.S. constitutes abandonment of the appeal. Gallo claimed that he returned to the U.S. before Apr. 1, 1997, but there was a factual dispute about this.

There was also a factual dispute about conversations that Gallo had with the INS district director for Anchorage, Alaska—a Mr. Eddy—after he returned to the U.S. Gallo and his wife claimed that Gallo told Eddy that he returned to the U.S. with a border crossing card that he subsequently lost, and that Eddy told them they would have to pay an extra \$1,000 fee to apply for adjustment of status but that there would be no further deportation proceedings against him. Eddy claims that he believed Gallo had reentered the U.S. legally and that he told Gallo he would have to file a new application for adjustment of status because his first application was deemed abandoned when he left the country. Gallo filed an adjustment application on Sept. 11, 1997.

On July 11, 1998, Gallo's attorney moved to withdraw his appeal to the BIA, requesting voluntary departure nunc pro tunc because of the medical emergency that caused him to go to Mexico. He did not move to reopen the proceedings to apply for adjustment. On Sept. 21, 1998, the BIA acknowledged that the appeal had been withdrawn and ordered the record returned to the IJ without further action. The BIA noted in its order that it had no jurisdiction to grant voluntary departure because of the withdrawal. On Aug. 10, 1999, Gallo went to the INS office to renew his work authorization, at the suggestion of Eddy. The INS then arrested Gallo and served him with a Notice of Intent to Reinstate Prior Order. On Aug. 16, 1999, the INS denied Gallo's application for adjustment. Gallo then obtained other counsel and, on Aug. 23, 1999, filed both a petition for review of the reinstatement order and a habeas petition. Both cases ultimately were consolidated at the Ninth Circuit.

In both cases, Gallo argued that his departure while his BIA appeal was pending was a voluntary departure rather than a deportation and that reinstatement of removal should not apply to him. The INS contended that the departure constituted a self-deportation and was subject to reinstatement. In the habeas case, Gallo also argued that he was denied due process due to his former counsel's ineffective assistance (failing to move to remand or reopen the deportation case to apply for adjustment, failing to advise him that leaving the country is deemed an abandonment of a BIA appeal). And he also argued that the INS should be estopped from proceeding against him because of affirmative misconduct on the part of Eddy.

The district court found that it had jurisdiction to determine whether the reinstatement statute applied to Gallo and concluded that it did not because his departure should be considered a voluntary departure. For this reason, the court found no need to resolve the ineffective assistance of counsel and estoppel claims.

On appeal, a panel of the Ninth Circuit found that it had jurisdiction over both the petition for review and the appeal of the habeas petition. The court noted that in *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001), it had ruled that reinstated orders of removal are subject to review by petition for review. As for the habeas case, the court followed *Castro-Cortez* in finding that, in cases where parties file actions in the wrong court because of

uncertainty as to which court has jurisdiction, the jurisdiction-saving transfer statute, 28 U.S.C. section 1631, allows the court to invoke jurisdiction over claims improperly brought in district court.

On the merits, however, the court concluded that it did not need to decide whether Gallo's departure constituted a voluntary departure or a self-deportation, because in either case it is encompassed within the plain language of the reinstatement statute. The statute applies where the attorney general finds that an alien has reentered the U.S. illegally "after having been removed or having departed voluntarily, under an order of removal." The court decided that this language encompasses all voluntary departures issued in removal proceedings. The court distinguished cases of voluntary departure granted by the INS in lieu of initiating removal proceedings, concluding that such voluntary departures are not under threat of removal and thus not encompassed by the statute. The court also concluded, with little discussion, that the reinstatement statute applies to deportation orders entered prior to the statute's enactment.

The court found that it could not resolve the factual issue of whether Gallo reentered the U.S. before or after Apr. 1, 1997, or whether he reentered unlawfully, and it transferred the case to the district court to resolve these issues. The court also transferred the ineffective assistance of counsel and estoppel issues, since these are no longer moot in light of the court's ruling on retroactivity. The court based its transfer on 28 U.S.C. section 2347(b)(3), part of the Hobbs Act, which allows a court considering a petition to review an administrative order to transfer proceedings to a district court "when a hearing is not required by law and a genuine issue of material fact is presented."

The petitioner, represented by the firm Stock & Donnelley in Anchorage, Alaska, has filed a petition for rehearing.

Gallo-Alvarez v. Ashcroft, __ F.3d __, Nos. 99-71038, 00-35238, and 00-35289 (9th Cir. Sept. 21, 2001).

9TH CIRCUIT GRANTS EN BANC REVIEW OF DOMESTIC VIOLENCE ASYLUM CASE

The U.S. Court of Appeals for the Ninth Circuit has granted the petition for rehearing of the Immigration and Naturalization Service in *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001). A three-judge panel of the court had ruled in this case that a Mexican petitioner who had been abused by her father was entitled to withholding of removal because she had been persecuted on account of her membership in the "particular social group" of her immediate family (see "9th Circuit Grants Withholding to Woman Who Was Abused by Father," IMMIGRANTS' RIGHTS UPDATE, May 10, 2001, p. 7). The INS rehearing petition contended that the panel should have remanded the case to the Board of Immigration Appeals to determine the issue of whether a person's family qualifies as a "social group" under the asylum statute. Before the panel ruled in the case, the INS had issued proposed regulations regarding the treatment of domestic violence in asylum cases, but it has not yet put them into effect (see "INS Issues Proposed and Final Asylum Regulations," IMMIGRANTS' RIGHTS UPDATE, Feb. 28, 2001, p. 1). The case will now be heard by the court en banc.

Aguirre-Cervantes v. INS, No. 99-70861 (9th Cir. Oct. 23, 2001).

3D CIRCUIT RULES STATE MISDEMEANOR CONVICTION FOR VEHICULAR HOMICIDE NOT A "CRIME OF VIOLENCE" AGGRAVATED FELONY

The Third Circuit Court of Appeals has ruled that a Pennsylvania misdemeanor conviction for vehicular homicide is not a "crime of violence" within the meaning of 18 U.S.C. section 16 and therefore does not constitute an aggravated felony under section 101(a)(43)(F) of the Immigration and Nationality Act. The court's decision was made on a petition for review of a removal order entered by the Board of Immigration Appeals.

The petitioner in this case, a Mr. Francis, had lived in the U.S. for over 25 years, and is married to a U.S. citizen. In May 1993, he caused a traffic accident in which two people were killed, and he was subsequently convicted of two counts of homicide by vehicle under Pennsylvania law, each count being classified as a misdemeanor of the first degree. He was sentenced to two consecutive terms of 18 to 60 months in prison, and after he served his sentence the Immigration and Naturalization Service commenced removal proceedings against him. At his hearing the immigration judge terminated proceedings, but the INS appealed, and the BIA reversed and issued a removal order, finding Francis deportable as an aggravated felon. Francis then filed a petition for review with the court of appeals.

As a threshold matter, the court found that it has jurisdiction to determine whether Francis is removable as an aggravated felon. Were the court to determine that his conviction constitutes an aggravated felony, however, jurisdiction would be barred by INA section 242(a)(2)(C).

The statute under which Francis was convicted applies to "any person who unintentionally causes the death of another person" while violating any state law or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic (except for driving under the influence of alcohol or a controlled substance, which is the subject of a different statute), if the violation is the cause of death. The statute encompasses criminal negligence as well as recklessness.

A "crime of violence" is defined in 18 U.S.C. section 16 as "(a) an offense that has as an element the use, or attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The BIA had recognized that subsection (a) does not apply to Francis's conviction but concluded that the conviction was encompassed in subsection (b).

The court declined to give deference to the BIA's interpretation of 18 U.S.C. section 16(b), noting that "pure questions of statutory construction must be resolved by courts." The court also pointed out that deference is only applicable to inquiries that implicate agency expertise "in a meaningful way," and in this case the BIA is not charged with administering and does not have particular expertise regarding the criminal statute at issue.

The court concluded that the state conviction does not meet two requirements of section 16(b): it is not a "felony," and it does not involve a substantial risk that physical force may be used. The court noted that subsection (b), unlike (a), expressly applies only to felony convictions. The court rejected the INS's contention that the conviction should be considered a felony under 18 U.S.C. section 3559(a)(5). That statute, for purposes of federal sentencing, assigns letter grades to offenses based on the maximum term of imprisonment authorized by the statute describing

the offense. For example, an offense not specifically classified in the statute defining it which authorizes imprisonment for a maximum period of less than five years but more than one year is classified as a Class E felony. However, the court concluded that this classification does not apply to Francis's conviction because the state expressly classified the offense as a misdemeanor.

The court distinguished its prior decision in *United States v. Graham*, 169 F.3d 787 (3d Cir. 1999), which held that a state misdemeanor conviction constituted an aggravated felony under INA section 101(a)(43)(G), which encompasses theft or burglary offenses "for which the term of imprisonment [is] at least one year." According to the court, subsection (G) by its plain language applies to all theft offenses carrying the requisite sentence, whether they are classified as felonies or misdemeanors. Subsection (F), on the other hand, expressly incorporates the requirements for a "crime of violence" of 18 U.S.C. section 16; and to qualify as a crime of violence under section 16(b), an offense must be a "felony."

The court also found support for its interpretation of the statute in the rule of lenity—the longstanding principle that deportation statutes must be given the narrowest possible interpretation because of the severity of deportation. The court noted that the Supreme Court recently affirmed the rule of lenity in *INS v. St. Cyr*, 121 S.Ct. 2268 (June 25, 2001).

Finally, the court concluded that, even were Francis's conviction considered to constitute a felony, it does not pose the substantial risk of physical force required by section 16(b). The state statute for homicide by vehicle encompasses a broad range of unintentional conduct, including, in this case, driving with a suspended license. The court noted that "[t]here are undoubtedly many reasons why a state would suspend a person's driving privileges, some of which may have no relation to a person's fitness to drive or the likelihood that he or she will use physical force." Indeed, one reason for suspension under Pennsylvania law is simply for failing to apply to renew a license. The court concluded that "driving while one's license is suspended simply does not bear a sufficient risk of physical injury" as to constitute a crime of violence under section 16(b). The court therefore granted the petition for review and remanded the case to the BIA to vacate the order of removal. *Francis v. Reno*, ___ F.3d ___, No. 00-2375 (3d Cir. Oct. 16, 2001).

2D CIRCUIT FINDS BIA ABUSED DISCRETION, REMANDS "ONE CHILD POLICY" ASYLUM CASE – In the case of a Chinese national who applied for asylum based on his claim that he was a victim of China's "one family, one child" policy, the Second Circuit Court of Appeals has reversed a decision by the Board of Immigration Appeals to deny the applicant's motion to reopen and has remanded the case for further proceedings. The court found that the BIA had abused its discretion and had acted arbitrarily and capriciously in denying the asylum applicant's motion.

The asylum applicant is Ke Zhen Zhao, a citizen of the People's Republic of China who arrived in the U.S. with a false passport in February 1992. After questioning him, the Immigration and Naturalization Service placed him in exclusion proceedings.

Zhao applied for asylum in September 1992. In support of his asylum application, Zhao filed copies of several documents, including a family planning registration card indicating that his

wife had undergone a tubal ligation. At his exclusion hearing in February 1994, he testified that he had worked in construction for a private company in the Fujian Province of China. His wife became pregnant four times during their marriage, but because she suffered a miscarriage and aborted one child, had borne only two sons. When he was asked at his hearing whether he could have more children, Zhao answered that his wife had been sterilized in September 1989. He said she underwent the sterilization after having been ordered to by Chinese government authorities.

Zhao claimed that he had voiced opposition to his wife's sterilization and promised not to have any more children, but he said the officials insisted that his wife be sterilized. Zhao testified that prior to his wife's sterilization, he was fined 20,000 yuan, and he stated that officials attempted to arrest him for his failure to pay the fine and because he had not immediately agreed to his wife being sterilized. Zhao escaped arrest by leaving Fujian before his wife underwent sterilization.

The immigration judge found Zhao's testimony to be not credible. The IJ pointed out that Zhao's written asylum application made no mention that Zhao's wife had undergone a sterilization procedure, even though he had submitted documentation showing she had undergone an oviduct ligation.

Zhao filed a timely appeal with the BIA in March 1994. The BIA did not issue its decision dismissing the appeal until August 1998. The BIA dismissed the appeal despite the fact that the law had changed in 1997, when the BIA ruled in another case that an individual whose spouse was forcibly sterilized could establish that he had suffered past persecution on account of political opinion. *See In re C-Y-Z*, 21 I. & N. Dec. 915 (BIA June 4, 1997). Despite the fact that Zhao's hearing testimony had focused on his wife's sterilization, the BIA summarily stated that it found substantial evidence to support the IJ's adverse credibility finding and affirmed the IJ's decision.

Zhao filed a motion asking the BIA to remand his case to the IJ. The BIA returned that motion because the case was no longer pending before it but advised Zhao to file a motion to reopen or reconsider. Zhao then filed a motion to reconsider on the basis of ineffective assistance of counsel and the production of additional evidence of his wife's sterilization in the form of radioactive dye tests performed in May 1998.

In its decision denying the motion to reconsider, the BIA first reasoned that because Zhao's present motion did not identify a legal or factual error in the ruling dismissing his appeal, the proper motion was not one for reconsideration. It therefore recast the motion as one to reopen his case. The BIA then denied the ineffective assistance claim. With respect to the radiographic dye tests, the BIA held that Zhao's wife was already sterilized when he presented his claims to the immigration judge and the "Immigration Judge so found." The BIA concluded that Zhao could not buttress his claim with a subsequent test when that test could have been conducted earlier and presented at the former hearing. Thus, his motion to reopen was denied. Zhao then filed a petition for review of the denial.

On appeal, the Second Circuit concluded that the BIA had properly re-characterized Zhao's motion to reconsider as a motion to reopen. As Zhao's case required a review of a motion to reopen, the appellate court could reverse the BIA only if it found an abuse of discretion. An abuse of discretion may be found in

those circumstances where the BIA's decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements.

In considering Zhao's claim, the appellate court reviewed the case law on cases involving China's strict family planning policy. It noted that as a result of the decision in *In re Matter of Chang*, 20 I. & N. Dec. 38 (BIA 1989), asylum applications based on claims arising from the family planning policy had been routinely denied except in instances where, according to the Second Circuit's decision, applicants produced "evidence that persecution would be or was taken for a reason other than general population control" [sic]. However, in 1996, Congress added the following language to the definition of "refugee": "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or [be] subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion." INA § 101(a)(42).

Subsequently, the BIA ruled in *X-P-T*, 21 I. & N. Dec 634 (BIA 1996), that individuals forced to undergo sterilization pursuant to population control programs should be deemed to have suffered past persecution on account of political opinion and are entitled to a presumption of a well-founded fear of future persecution. *X-P-T* was followed by *In re C-Y-Z*, 21 I. & N. Dec 915 (BIA 1997), holding that an individual can establish past persecution and become entitled to the presumption of a well-founded fear of future persecution if he can show that his spouse was forced to undergo sterilization.

Zhao based his claim that the BIA had abused its discretion in denying his motion to reconsider on the fact that, regarding the issue of his wife's sterilization, the BIA simply stated that the "Immigration Judge so found." Zhao contrasted that ambiguous "finding" with the ruling stating that Zhao's application could not be buttressed with the results of radioactive dye tests that the BIA concluded could have been conducted earlier and presented at the 1994 exclusion hearing. Zhao insisted that once the BIA recognized that his wife had been sterilized, it was obligated to apply the IIRIRA and the holding of *C-Y-Z*.

The Second Circuit agreed with Zhao and stated that no matter how one construed the BIA's reference to what the IJ had "found" at the exclusion hearing, it was an abuse of discretion to deny Zhao's motion to reopen. The court held that if the BIA had considered the fact of Zhao's wife's sterilization established, it should have explained why Zhao's case would not be reopened in light of *In re C-Y-Z*. The court proceeded to analyze the similarities between Zhao's case and *C-Y-Z* and ultimately concluded that, if the BIA had accepted that Zhao's wife was sterilized, it abused its discretion by not reaching the same conclusion in his case as it did in *C-Y-Z*. It cited *Vargas v. INS*, 938 F.2d 358, 362 (2d Cir. 1991), for the proposition that application of agency standards in a plainly inconsistent manner across similar situations evinces a lack of rationality as to be arbitrary and capricious.

The government argued that no finding had been made re-

garding the sterilization. It also argued that in his motion to reopen Zhao was required to show that the evidence he sought to offer was not available at his first hearing, and that he failed to explain why the tests results could not have been obtained earlier. The court agreed with the government that the transcript of the IJ's decision contained no explicit finding that Zhao's wife was sterilized. The court concluded, however, that the BIA had nevertheless abused its discretion. The court reasoned that if the BIA did not acknowledge that Zhao had already established that his wife had undergone a tubal ligation, it should have afforded him an evidentiary hearing so that he could introduce his new evidence.

The court of appeals noted that the BIA, on its own accord, converted Zhao's motion to reconsider to a motion to reopen. It also highlighted the fact that the BIA never afforded Zhao an opportunity to provide an explanation as to why the dye tests were not previously obtainable. Such an explanation would have been unnecessary with a motion to reconsider but was critical to a motion to reopen. In failing to provide that opportunity, the court held, the BIA then abused its discretion by summarily stating that the tests could have been conducted earlier and presented at the former hearing. The court held that because the change to the definition of "refugee" and the decision in *C-Y-Z* came much later than Zhao's exclusion hearing, the significance of the tests would not have been known at the time of Zhao's exclusion hearing. With these observations, the court concluded that the BIA improperly engaged in speculation when it concluded that the tests on Zhao's wife could not have been conducted at the time of the original hearing.

The court further stated that the BIA's analysis, which addressed Zhao's new evidence in two sentences, amply demonstrated that the BIA created controversy and confusion. Citing *Anderson v. McElroy*, 953 F.2d 803, 806, the court stated, "Failure to explain a decision adequately provides a ground for reversal." Accordingly, the court reversed the denial of the motion to reopen and remanded the case to the BIA.

Zhao v. Reno, 265 F.3d 83 (2d Cir. 2001).

Employment Issues

11TH CIRCUIT CLARIFIES WHAT CONSTITUTES A "CHARGE" IN EMPLOYMENT DISCRIMINATION CASES – In a case involving allegations of racial and gender discrimination in the workplace, the Eleventh Circuit Court of Appeals has held that filling out an intake questionnaire can constitute filing a formal charge of discrimination if the individual who fills out the questionnaire manifests an intent to activate the Equal Employment Opportunity Commission's (EEOC's) administrative process.

The petitioner in this case is an African-American woman who alleged her employer fired her in violation of Title VII of the Civil Rights Act of 1964 (Title VII). Shortly after being fired, she contacted the EEOC, and the agency sent her an intake questionnaire. She immediately filled it out, providing detailed information about the employer and the discriminatory incidents, and including a list of witnesses. She signed the questionnaire under penalty of perjury and immediately returned it to the EEOC. One month later, she contacted the EEOC and was told that, due to a

backlog, the agency had not yet reviewed her intake form. Ten months later, she contacted the EEOC again and was told that the agency had contacted her to request more information; she, however, had never actually received any additional communication from the EEOC.

The EEOC told her it would proceed with her complaint using the information she had already provided on the intake questionnaire, and it did proceed to notify the employer of her allegations. However, the EEOC eventually dismissed her claim, stating that it was filed after the filing period provided for by the statute of limitations had expired. She contacted the EEOC again to explain that she had filed the intake questionnaire shortly after being fired, well within the statute of limitations. The EEOC then retracted its dismissal of her claim and issued her a Notice of Right to Sue, which allowed her to file a complaint against her former employer in federal court. When she sued, however, the U.S. District Court for the Southern District of Georgia granted the employer summary judgment, holding that the petitioner had failed to file a timely verified charge with the EEOC.

The court of appeals vacated the lower court's decision and remanded the case after it found that the intake questionnaire was verified and did meet the regulatory requirements of a charge.

To sue an employer under Title VII, individuals must first exhaust their administrative remedies, which means they must first file a claim with the EEOC, which is the federal agency that enforces the law. According to the statute, the first step a complainant must take is to file a charge with the EEOC. The regulations specify that the charge must be in writing, signed, and verified. In addition, the charge should contain certain information, such as the contact information for the parties, a clear statement of the facts that allegedly constitute employment discrimination, the number of persons employed by the defendant employer (if known), and a statement disclosing whether a state or local agency has begun an investigation. *See* 29 CFR § 1601.12(a). However, the court found that the requirements for a charge are actually very minimal given that, even if a charge does not contain the suggested information, the EEOC will deem a charge "minimally sufficient" when it receives a statement that identifies the parties and generally describes the actions complained of. Furthermore, a charge may be amended.

In its decision, the Eleventh Circuit joined the Third, Seventh, and Eighth Circuits in holding that an intake questionnaire meets the requirements of a charge if the notice to the EEOC leads a reasonable person to believe that the complainant has "manifested an intent" to activate Title VII's machinery. (The Fourth, Fifth, and Ninth Circuits have also considered whether an intake questionnaire meets the requirements for a charge but have taken different approaches in deciding that it can satisfy this Title VII requirement.) The "manifest intent" approach requires the complainant to clearly indicate that he or she wishes the EEOC to begin an investigation of his or her allegations. Once a sufficient charge is filed, the EEOC must notify the employer within ten days that a charge has been filed against it. The "manifest intent" approach also ensures that once the complainant's intent is clear, the EEOC's inaction cannot invalidate the complainant's claim. The court noted that it is the EEOC's obligation to serve the party against whom the charge has been filed (i.e., to serve the charge on the party) and that any deficiency in the EEOC's

performance should not adversely affect a plaintiff's right to sue.

Wilkerson v. Grinnell Corp., No. 00-13915, 2001 US App. LEXIS 22604 (11th Cir. Oct. 22, 2001).

D.C. CIRCUIT EXTENDS *WEINGARTEN* RIGHTS TO NONUNION WORKERS

— In an important decision for nonunion workers across the country, the D.C. Circuit Court of Appeals has upheld a July 2000 decision by the National Labor Relations Board (NLRB) to extend "*Weingarten* rights" to nonunionized workers who are called into a disciplinary meeting by their employer.

Weingarten rights arise out of a case, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), in which the Supreme Court held that Section 7 of the National Labor Relations Act (NLRA) provides employees with a statutory right to request the presence of a union representative at an interview which the employee reasonably believes might result in disciplinary action. *Id.*, 420 U.S. at 256. Section 7 of the NLRA states that "[e]mployees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *See* 29 U.S.C. § 157. The NLRB and the courts have recognized that Section 7 protects both union and nonunion employees who engage in "concerted activity." *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). In *Weingarten*, the facts arose in a unionized workplace, and thus the Supreme Court did not reach the issue of whether these rights extend to nonunionized workers. Over the years, the NLRB has changed its position as to whether nonunion employees enjoy *Weingarten* rights.

In a 1982 decision, *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982), the NLRB extended the *Weingarten* rule to cover employees in nonunion workplaces, holding that such rights stem from Section 7 of the NLRA rather than from a union's right of representation under Section 9. Three years later, however, the NLRB reversed itself in *Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985), holding that the *Weingarten* rule does not apply if there is no certified or recognized union. Thus, the NLRB's ruling in the case before the D.C. Circuit overturned a 12-year precedent under which *Weingarten* rights were limited to unionized employees.

The present case involves two employees of the Epilepsy Foundation of Northeast Ohio who were discharged. After submitting a memorandum to their supervisor's boss that criticized their supervisor, they were each called to a meeting with management. One of the employees refused to attend the meeting unless his coworker was present, but the company denied this request, and he was subsequently fired. The other coworker went ahead and met with management on his own, and he was given a written warning for writing the memo. He was fired a few months later for insubordination, which included writing and submitting the memo. The administrative law judge (ALJ) who heard the fired workers' wrongful termination complaint found that "current [NLRB] law" does not extend *Weingarten* rights to nonunion employees and thus that the discharge of the first employee did not violate the NLRA. In a 3 to 2 vote, the NLRB reversed the ALJ's finding and extended the *Weingarten* rule to nonunion workers.

In affirming the NLRB's decision, the D.C. Circuit rejected the Epilepsy Foundation's argument, *inter alia*, which relies on the dissenting opinion of Board Member Brame that an extension of *Weingarten* rights to nonunion workers conflicts with Section 9(a) of the NLRA because it forces employers to "deal with" the

equivalent of a union representative. Section 9(a) provides that representatives selected for the purposes of collective bargaining are the exclusive representatives of the employees. However, the court noted that "dealing" with an employee representative is not equivalent to bargaining collectively with a union and that under the *Weingarten* rule the employer would not be required to bargain with the employee's representative, since the employer was free to forego the interview and resolve the matter in some other way.

Finally, the NLRB had applied its ruling extending the *Weingarten* rule to nonunion settings retroactively, holding that the Epilepsy Foundation wrongfully discharged the employee who requested the assistance of his coworker at the meeting. However, the court of appeals held that the NLRB could not apply this new ruling retroactively, since it must "protect the settled expectations of those who had relied on the preexisting rule," such as the Epilepsy Foundation.

Epilepsy Foundation of Northeast Ohio v. NLRB, No. 00-1332 2001, U.S.App. LEXIS 23722 (D.C. Cir. Nov. 2, 2001).

CALIFORNIA ENACTS NEW LAW TO PROTECT DISPLACED JANITORS

Beginning Jan. 1, 2002, janitors in California will have a little more job security because of the Displaced Janitor Opportunity Act, which California Governor Gray Davis signed into law on Oct. 13, 2001. Senate Bill (SB) 20 requires janitorial contractors and subcontractors that secure a new building service contract to continue employing the janitors of the former contractor or subcontractor for at least 60 days. At the end of the 60 days, the new contractor is required to provide a written evaluation of each janitor's job performance and to continue employing janitors whose performance has been satisfactory.

The new law applies to janitorial companies with at least 25 janitors. Janitors who are not retained for the initial 60-day period by the new contractor or subcontractor will have a cause of action against the contractor, not the building owner, for back pay. This law is modeled after similar local ordinances in Philadelphia, San Francisco, and Washington, DC.

While the enactment of SB 20 was a great victory for the Service Employees International Union (SEIU), which is the collective bargaining representative for janitors, Governor Davis dealt a blow to workers in general by vetoing SB 71 and Assembly Bill 1176, which aimed at increasing the benefit level of workers' compensation payments over a five-year period. This measure had support from both labor and employer groups that support an increase in the benefit level, which is considered among the lowest in the country for workers injured on the job. However, the different interest parties do not agree on other cost-saving reforms that employers are seeking. In his veto message, Davis stated that the bill did not do enough to promote an early return-to-work policy for injured workers.

SUPREME COURT REFUSES TO HEAR AGE DISCRIMINATION APPEAL BY FOREIGN NATIONAL

The U.S. Supreme Court has denied the petition for writ of certiorari by a Mexican national who was discriminated against by the North Carolina Growers' Association (NCGA) because he was over forty years old when he applied to perform agricultural work in North Carolina. In his petition to the Supreme Court, Mr. Reyes-Gaona appealed the Fourth Circuit

Court of Appeals' decision that the Age Discrimination in Employment Act of 1967 (ADEA) does not protect non-U.S. citizens who are discriminated against in a foreign country by a U.S. employer. The Fourth Circuit's decision noted that Reyes-Gaona was not authorized to work in the United States at the time he was discriminated against. (See "Foreign Nationals Not Protected Against Age Discrimination Outside U.S.," IMMIGRANTS' RIGHTS UPDATE, June 29, 2001, p. 13).

Reyes-Gaona v. North Carolina Growers' Assn., et al., 01-342, cert. denied, 2001 U.S. LEXIS 10008 (Oct. 29, 2001).

Immigrants & Welfare Update

JUSTICE DEPT. CONFIRMS VALIDITY OF CLINTON'S ORDER REGARDING ACCESS TO SERVICES FOR LIMITED ENGLISH PROFICIENT PERSONS

The U.S. Dept. of Justice (DOJ) has issued a memorandum that confirms the validity of an executive order former President Bill Clinton issued to ensure that persons with limited English proficiency (LEP) have meaningful access to programs and activities conducted and funded by the federal government. Clinton's order, Executive Order 13166, clarifies the requirements of Title VI of the Civil Rights Act, which prohibits recipients of federal funds from discriminating on the basis of race, color, or national origin. Discrimination on the basis of national origin includes the failure to provide LEP persons with meaningful access to federally funded activities and programs.

The executive order is published at 65 Fed. Reg. 50,121-22 (Aug. 16, 2000). The DOJ's memo, which was issued Oct. 26, 2001, and explanatory questions and answers are available on the DOJ Civil Rights Division web site at www.usdoj.gov/crt/cor.

The executive order required agencies that provide federal financial assistance to develop guidance that directs recipients of federal funds in providing meaningful access to LEP persons. The order also required federal agencies to develop internal plans for providing meaningful access to LEP persons. The DOJ published guidance on agencies' obligations under the executive order concurrently with the order's release (see 65 Fed. Reg. 50,123-25 (Aug. 16, 2000)).

Individual members of Congress have made several attempts to repeal the executive order. In addition, the U.S. Supreme Court ruled that private individuals cannot bring Title VI lawsuits based on a claim that an agency's failure to provide meaningful access to LEP persons is discriminatory by virtue of its "disparate impact" on LEP persons. *Alexander v. Sandoval*, 121 S.Ct. 1511 (2001). The DOJ memo confirms that the ruling in *Sandoval* was limited to private lawsuits and did not affect the validity of the executive order or the ability of federal agencies to enforce Title VI.

The memo clarifies that four "reasonableness" factors set forth in the original DOJ guidance inform the actions agencies, as well as recipients, must take to meet their Title VI obligations. The factors are:

- the number or proportion of people who will be excluded from the federally funded program or activity absent efforts to remove language barriers;
- the frequency of the recipients' contact with persons who speak a particular language;
- the nature and importance of the services provided (i.e., LEP access is more important in cases where a denial of service would

have life-or-death or other serious implications); and

- the resources available to implement LEP access. (The memo notes specifically that the cost of providing LEP access may be factored into the determination of available resources.)

The memo requires agencies that have developed guidance under the executive order to review their guidance for (1) consistency with the four-point clarification above, (2) compliance with the Administrative Procedure Act, and (3) compliance with the requirement that significant regulatory actions be cleared by the Office of Management and Budget.

Agencies, including those that have already published guidance documents, must make any revisions indicated by this review and submit their guidance to the public for comment. Comments received from the public may require additional revisions. All revisions must be completed by Feb. 26, 2002, 120 days after the release of the memo. Agencies that have not yet developed guidance are required to submit guidance to the DOJ by Dec. 26, 2001, 60 days after the date of the memo, and to collect public comment and publish final regulations by Feb. 26, 2002.

SENATE COMMITTEE APPROVES PARTIAL FOOD STAMP RESTORATION

The Senate Agriculture Committee has voted to restore food stamp eligibility to a large proportion of the immigrants currently excluded from the program. Although the committee proposal falls short of fully restoring assistance to all lawfully present immigrants, it would likely provide assistance to about 60,000 children and as many as 100,000 adults at a cost of about \$1.3 billion dollars over 10 years.

The restorations were proposed by Sen. Tom Harkin (D-IA), chair of the Agriculture Committee, and were part of a \$6.2 billion dollar nutrition title of a \$70 billion dollar Farm Bill (S. 1628), which passed the committee on November 14. Interestingly, the ranking member of the committee, Sen. Richard Lugar (R-IN), had proposed an even larger nutrition title and a larger food stamp restoration for immigrants. Sen. Lugar's proposal would have provided \$10 billion for nutrition and about \$1.7 billion in additional food stamp eligibility for legal immigrants. Sen. Lugar's proposal was defeated in the committee by a 12-9 vote.

The Harkin proposal would make the following changes in food stamp eligibility for "qualified" immigrants:

- Expand the work history exemption to permit assistance for lawful permanent residents who can claim credit for having worked for 16 quarters in the U.S. (either for their own work, for quarters worked by their parents before they turned 18, or for work by the LPR's spouse). The current exemption requires 40 quarters of work history.

- Expand the exemption for children so that it applies without regard to when the child came to the U.S. Currently, the exemption applies only to children who entered the U.S. before Aug. 22, 1996.

- Expand the exemption for disabled immigrants so that it applies without regard to when the immigrant came to the U.S. Currently, the exemption applies only to children who entered before Aug. 22, 1996. Note that certain other provisions that limit the participation of these immigrants would remain in place.

- Expand the exemption that currently applies to refugees, asylees, and others fleeing persecution, so that persons who qualify for these exemptions will remain eligible even after the

seven-year period has expired.

The House has already passed its version of the Farm Bill (H.R. 4626), containing only \$3.2 billion dollars in nutrition improvements and no restorations for immigrants. The Senate and House bills now go to a conference committee, which will resolve the differences between them. Most observers expect a final bill to be negotiated and passed by Congress after Thanksgiving but before Congress adjourns for the year.

HHS SEEKS COMMENTS ON TANF REAUTHORIZATION – The U.S. Dept. of Health and Human Services (HHS) has published a notice soliciting comments on the upcoming reauthorization of the Temporary Assistance for Needy Families (TANF) program. The request for comments supplements a series of regional meetings on TANF reauthorization that the HHS has been conducting with key state officials and tribal leaders. Participation in the regional meetings is by invitation only. Advocates across the country have protested their lack of access to the meetings. The request for comments was issued in response to the protests.

TANF reauthorization provides an opportunity to advocate for many important immigrant issues. These include the restoration of TANF and other benefits denied to immigrants by the 1996 welfare law, improving access to English as a second language training through TANF job training programs, and ensuring that all facets of the TANF program, including the initial assessment, training, job placement and supportive services, are responsive to the needs of limited English proficient participants.

The deadline for submitting comments is Nov. 30, 2001. NILC will be developing proposed comments to be distributed through our email lists by mid-November.

66 Fed. Reg. 52,773 (Oct. 17, 2001).

Miscellaneous

NATIONAL IMMIGRATION FORUM SEEKS DIRECTOR FOR CENTER FOR THE NEW AMERICAN COMMUNITY

The National Immigration Forum, one of the nation's leading authorities on immigration, seeks an experienced director for its new project, the Center for the New American Community. The director is responsible for overall development, management, implementation, and evaluation of the Center's work, including planning, policy analysis, seeking and securing funds, organizing an advisory council, and executing project plans. The Forum seeks a strategic thinker with the ability to plan, organize, and direct a comprehensive program. Required skills include personnel management, budget development, and detailed knowledge of immigration issues. Candidates should have a B.A. in public policy or a related field (MPA a plus) and seven-plus years' progressive management experience in a non-profit, with at least five years having been related to immigrant issues. Familiarity with federal, state, and local government policies and programs is preferred. Excellent salary/benefits. Interested parties should send a cover letter, writing sample, three professional references, resume, and confidential salary history to: A. Harvey, 16421 Ellipse Terrace, Bowie, MD 20716. Applicants may also submit materials via e-mail (info@forexcellence.com) or fax (202-544-1905). EOE/AA employer. Respond by close of business Monday, Nov. 26, 2001. No calls please.

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