There will be no issue next week as our Attorney Editors will be attending the AILA conference. Our next issue will be dated June 27, 2011.

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Padilla v. Kentucky One Year Later: Courts Split over Interpretation and Application of the U.S. Supreme Court's Constitutional Holdings

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On March 31, 2010, the U.S. Supreme Court issued its landmark decision in *Padilla v. Kentucky* in which it held that defense attorneys have an affirmative obligation

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to advise noncitizens about the immigration consequences of a plea to criminal charges prior to the entry of the guilty plea.[1] In the year since the Supreme Court's decision, the state and lower federal courts have at times struggled in their efforts to apply the *Padilla* holding to motions to vacate guilty pleas and petitions for post-conviction relief.[2] Counsel for a noncitizen seeking to vacate a guilty plea or for other forms of post-conviction relief must diligently research the applicable laws, procedures, and precedent for the individual case.[3]

This article reviews several of the precedent decisions, noting the splits regarding the interpretation and application of the Supreme Court's holdings in *Padilla v. Kentucky*. It also reviews the ongoing importance of the immigration consequences of pleas in the immigration context and addresses motions for continuances based on pending post-conviction relief as well as motions to terminate and motions to reopen once a conviction has been vacated under *Padilla v. Kentucky*.

Lest practitioners believe that the issue of immigration consequences of guilty pleas has been decisively determined with *Padilla v. Kentucky*, the importance of the consequences of a guilty plea continues to be litigated before the federal courts following removal proceedings. The U.S. Supreme Court recently granted a petition for a writ of certiorari in *Judulang v. Holder*.[4] This case presents the following issue: Whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him or her deportable and excludable under differently phrased statutory subsections, but who did not depart and reenter the U.S. between his or her conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former INA § 212(c).[5] This case will resolve the circuit split[6] regarding eligibility for a § 212(c) waiver for guilty pleas entered prior to the 1996 repeal of § 212(c) and the Supreme Court's decision in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001).[7]

PADILLA V. KENTUCKY BEFORE THE STATE AND FEDERAL CRIMINAL COURTS

Several common themes have emerged in criminal court litigation regarding *Padilla* motions to vacate pleas and post-conviction relief. These include (1) whether the *Padilla* holdings can be applied retroactively to pleas, including where the noncitizen is no longer deemed to be "in custody," (2) whether a demonstration of the lack of any immigration advisal by defense counsel can automatically lead to a finding that the noncitizen was prejudiced, (3) whether a claim that the defense attorney failed to advise a noncitizen regarding the immigration consequences or failed to give completely accurate advice about the immigration consequences can be "cured" where a state court advised a noncitizen that there may be immigration consequences immediately prior to the entry of a guilty plea by a noncitizen, (4) whether *Padilla* applies to state dispositions that are not convictions under state law yet are convictions for purposes of federal immigration law, and (5) other procedural issues regarding *Padilla* claims.

Retroactive Application of *Padilla v. Kentucky*

The federal and state courts have split regarding whether *Padilla v. Kentucky* must be applied retroactively. As discussed below, the main issue has been whether the U.S. Supreme Court created a new rule of criminal procedure or applied the previously announced *Strickland v. Washington*[8] standard for claims of ineffective assistance of counsel in criminal proceedings.

Federal Courts. One federal district court held that the holding of *Padilla v. Kentucky* is a new rule but not subject to one of the retroactivity exceptions in *Teague v. Lane*[9] because the U.S. Supreme Court did not announce a "watershed" rule of criminal procedure.[10] Contrary to this decision, another federal district court held that *Padilla v. Kentucky* was not a new rule of criminal procedure but instead an extension of the rule in *Strickland v. Washington*.[11]

State Courts. The Court of Special of Appeals of Maryland held that *Padilla* is a new rule and therefore cannot be applied retroactively to the noncitizen's case.[12] It affirmed the denial of the petition for a writ of coram nobis.

The Court of Appeals of Minnesota held that the *Padilla* holding is not a new rule of criminal procedure.[13] The court of appeals acknowledged that the Minnesota Supreme Court's prior 1998 precedent had been overruled by the U.S. Supreme Court's *Padilla* decision.[14]

The Superior Court of New Jersey held that the noncitizen defendant was entitled to an evidentiary hearing on his claim that his defense counsel rendered ineffective assistance where he allegedly failed to discuss the immigration consequences of the guilty plea.[15] The Superior Court of New Jersey reversed the trial court and remanded for an evidentiary hearing where the attorney gave affirmative misadvice to the noncitizen defendant about the immigration consequences for a plea of guilty to third-degree distribution of a controlled dangerous substance within 1,000 feet of a school.[16]

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The Court of Appeals for the First District of Texas found that *Padilla v. Kentucky* applies retroactively because the holding regarding ineffective assistance of counsel for failure to advise about the immigration consequences of a plea is an extension of *Strickland v. Washington*, not a new rule of criminal procedure.[17] The court of appeals held that the noncitizen had demonstrated ineffective assistance of counsel where his defense attorney knew that the defendant was not a U.S. citizen yet failed to conduct basic research and advise him that a misdemeanor plea to possession of a firearm rendered him deportable and effectively denied him the opportunity to apply for naturalization.[18]

The Colorado Court of Appeals held that the U.S. Supreme Court's *Padilla* decision was not a new rule of criminal procedure. The court of appeals reviewed the Colorado Supreme Court's 1987 decision in which it had held that under the Colorado constitution, defense counsel must accurately advise a noncitizen about the immigration consequences prior to the entry of a plea.[19]

Ineffective Assistance and Prejudice Under *Strickland v. Washington* for Purposes of *Padilla v. Kentucky* Motions and Petitions for Post-Conviction Relief

In a claim of ineffective assistance of counsel under *Strickland v. Washington*, a defendant must demonstrate that "counsel's performance was deficient" and that "there exists 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[20] The courts have considered the legal standard to demonstrate prejudice with different results.

Federal Courts. The Ninth Circuit granted an appeal of the denial of a motion to withdraw a plea of guilty where the defense counsel failed to provide any advice about the immigration consequences despite the inquiry by the noncitizen's spouse.[21] It held that the inadequate advice to the noncitizen regarding the immigration consequences of a guilty plea constituted a "fair and just reason" for requesting the withdrawal of his guilty plea prior to sentencing.[22] The Ninth Circuit found that the legal standard for evaluating whether the noncitizen had suffered prejudice was whether proper legal advice "could have at least plausibly motivated a reasonable person in [the defendant's] position not to have pled guilty."[23] The Ninth Circuit rejected the district court's reasoning that the noncitizen would still have pled guilty because the noncitizen pled guilty without receiving an answer from defense counsel regarding the immigration consequences of his plea and he failed to raise his question about immigration consequences during the Rule 11 colloquy with the court.[24]

State Courts. The Court of Appeals for the First District of Texas found that a noncitizen had been prejudiced by his counsel's failure to advise him about the immigration consequences where the defense counsel knew that he was not a U.S. citizen.[25]

The Washington Supreme Court found that affirmative misadvice constitutes ineffective assistance of counsel under the first prong of *Strickland v. Washington*, supra.[26] It further found that actual and substantial prejudice is not required to find that the noncitizen was prejudiced by his defense counsel's actions for the second *Strickland* prong.[27]

State Court Advisals and Plea Questionnaires: A Cure for Failure to Advise or Inaccurate Advice by Defense Counsel?

Prior to the New Jersey Superior Court's decision, the New Jersey Supreme Court had issued a decision before *Padilla* in which it had found that the advisal contained in the plea questionnaire (plea may result in deportation) was not sufficient and that the plea questionnaire should be revised to better alert a noncitizen that a plea of guilty to an aggravated felony for immigration purposes will result in almost certain deportation from the U.S.[28]

The Rhode Island Supreme Court held that, where the state court gave an advisal about immigration consequences and the noncitizen signed a plea agreement with written advisals about immigration consequences, the noncitizen could not demonstrate ineffective assistance of counsel because he had adequate notice about potential immigration consequences.[29]

The Court of Appeals for the First District of Texas held that the general warning about immigration consequences contained in the plea papers was insufficient to cure his counsel's failure to provide a specific advisal about the immigration consequences.[30] Similarly, the Colorado Court of Appeals found neither the general immigration consequences advisal for certain felonies contained in a plea agreement form nor the court's general colloquy with the noncitizen defendant evidenced that his defense counsel had accurately advised him about the immigration consequences of his misdemeanor plea.[31]

A Florida appellate court decided that, where the trial court provided a general warning under Fla. R. Crim. P. 3.172(c)(8), the advisal cured the defense attorney's misadvice.[32] The appellate court found that, based on the "cure" by the trial court provided in the immigration consequences warning, the noncitizen could not demonstrate prejudice required under *Strickland v. Washington*, supra.[33]

The New York Supreme Court, Appellate Division, Second Department, held that the county court's advisal that a plea "may" lead to deportation was not misleading but instead gave the noncitizen notice and an opportunity to obtain an advisal from his defense counsel or an immigration attorney.[34]

The Washington Supreme Court held that affirmative misadvice by defense counsel regarding the likelihood of immigration consequences cannot be cured by a plea agreement advisal regarding potential immigration consequences.[35]

State Alternative Dispositions and Federal Immigration Law: Does *Padilla* Apply?

State courts have split regarding whether *Padilla v. Kentucky* applies to state dispositions that are not convictions under state law yet are convictions for purposes of federal immigration law. The Colorado Court of Appeals held that a deferred judgment for a felony charge was not reviewable in state post-conviction proceedings because it was not a conviction under state law.[36]

Other Procedural Issues Regarding *Padilla* Claims

Waiver of Right to Counsel and *Padilla v. Kentucky*. The Fifth Circuit has considered the impact of *Padilla v. Kentucky* in one published decision involving an appeal of an illegal reentry prosecution under 8 USCA § 1326. In that case, the Fifth Circuit denied an appeal of a motion to dismiss an indictment under 8 USCA § 1326 where the noncitizen waived his right to be represented by counsel in the criminal proceedings.[37]

State Court Failure to Provide Mandatory Immigration Advisals. The court for the District of Columbia held that, where the court failed to provide the statutory advisal about immigration consequences for each criminal count prior to accepting a noncitizen's guilty plea, the conviction must be vacated.[38]

The Supreme Judicial Court of Massachusetts affirmed the denial of a motion to withdraw the admission of sufficient facts where the trial court failed to provide the required immigration advisals prior to the entry of a plea.[39] The court found that the noncitizen had not demonstrated "more than a hypothetical possibility he faces immigration consequences" at the time when he filed his motion to withdraw.[40]

The Court of Appeals of Minnesota has noted that the issue regarding whether a trial court's failure to provide the mandated immigration consequences warning prior to the entry of a plea under Minnesota criminal procedure can be the basis for vacatur of a guilty plea has not yet been decided where a noncitizen defendant was represented by counsel.[41] In a prior case, the court of appeals held that, where a noncitizen had pled guilty without being represented by counsel and the trial court failed to inquire whether the noncitizen understood that he could be subject to immigration consequences, either through a written plea petition or through a colloquy, the motion to vacate the plea was granted.[42] In so doing, the court of appeals noted that the Sixth Amendment right to effective assistance of counsel was not at issue as the noncitizen was not represented by counsel.[43]

State Law Remedies. Noncitizens in Illinois and Virginia who have completed their criminal sentence (including a term of probation, conditional discharge, supervision, or imprisonment) will face an uphill battle for post-conviction relief. In *Padilla v. Kentucky*, the majority found that immigration consequences and criminal convictions are "enmeshed" and that "deportation is nevertheless intimately related to the criminal process."[44]

The Illinois Supreme Court, however, has held that deportation proceedings are not a consequence relating to a sentence imposed based on a plea.[45] In *People v. Carrera*, supra, the defense counsel had informed the state court that a guilty plea to possession of a controlled substance would not be a problem for immigration purposes, after which the noncitizen pled guilty and the state court sentenced the noncitizen to 24 months of probation.[46] When the noncitizen applied for a replacement resident alien card, the Department of Homeland Security (DHS) detained him and placed the noncitizen in removal proceedings.[47] The Illinois Supreme Court held that the noncitizen's removal proceedings do not constitute "imprisonment" for purposes of the Post-Conviction Hearing Act because the federal removal proceedings are not related to the sentence imposed by the state court.[48] Although the noncitizen was detained in DHS custody for removal proceedings after his state sentence was completed, the Illinois Supreme Court held that such custody did not allow him to pursue his petition under the state Post-Conviction Hearing Act despite the U.S. Supreme Court's ruling in *Padilla v. Kentucky* and the affirmative misadvice by the defense counsel before the state court.[49]

In Virginia, the Supreme Court of Virginia likewise held that petitions for post-conviction relief must be filed timely in order to pursue a claim of ineffective assistance of counsel based on affirmative misadvice about the immigration consequences of a plea.[50] The court held that a petition for a writ of audita querela is not available to seek post-conviction relief from a sentence in Virginia.[51] The court also held that a petition for writ of coram vobis is not the proper procedural mechanism as coram vobis is

only available to correct "an error of fact not apparent on the record, not attributable to the applicant's negligence, and which if known by the court *would have prevented* rendition of the judgment,"[52] which does not include the failure of defense counsel to advise a noncitizen about the immigration consequences of a plea.[53] Rather, a timely petition for a writ of habeas corpus under state law is the correct procedural mechanism to challenge the error of fact regarding ineffective assistance of counsel.[54]

The Georgia Supreme Court had held that a noncitizen cannot file a late direct appeal of a trial court's judgment where the trial court failed to advise him about the immigration consequences of his plea and he failed to demonstrate that the withdrawal of the plea was necessary to correct a manifest injustice.[55] The supreme court did suggest, however, that the noncitizen could file a petition for a writ of habeas corpus with an ineffective assistance of counsel claim under *Padilla v. Kentucky*.[56]

Violations of the Vienna Convention on Consular Relations. In an interesting decision, a federal district court in Georgia noted that whether there is an affirmative obligation under the Sixth Amendment for defense counsel to notify a noncitizen defendant about the right to consular notification under the Vienna Convention on Consular Relations[57] requires "fresh evaluation particularly in light of" *Padilla v. Kentucky*.[58]

Padilla Motions for Continuances and Motions to Reopen Before the BIA and the Immigration Courts

Counsel for noncitizens in removal proceedings must be particularly mindful of the issue of exhaustion before the immigration court and the Board of Immigration Appeals (BIA or Board). In particular, the following documentation should be provided to support a motion for a continuance, a motion to terminate proceedings, and a motion to reopen:

- a certified copy of the motion or petition filed with the criminal court to vacate a guilty plea based on *Padilla v. Kentucky* along with any attachments to the motion or petition, such as a sworn affidavit of the noncitizen and transcript of the prior criminal court proceedings;
- a certified copy of the prosecutor's response;
- a certified docket printout or printout from the court access webpage, evidencing the date of the next hearing; and
- a certified copy of the criminal court's decision in which the plea was vacated for motions to terminate and motions to reopen.

Motions for Continuance

On the immigration law front, the BIA has issued unpublished opinions related to motions for continuances pending post-conviction relief. Recent unpublished Board decisions demonstrate the relevance of requesting continuances pending the outcome of motions to vacate guilty pleas and post-conviction petitions and of providing copies of the pending criminal court proceedings based on *Padilla v. Kentucky*.

In one case, the Board found that there is no due process right to a continuance in removal proceedings for post-conviction relief based on *Padilla v. Kentucky*.[59] The Board member found that the noncitizen had not demonstrated that his collateral attack against his conviction in state court had been successful to vacate his guilty plea after five months and that granting a continuance in every situation where a noncitizen raises a *Padilla* argument would "invite abuse" and financially cost the U.S. government to continue to detain noncitizens subject to mandatory detention under INA §236(c) [8 USCA §1226(c)].[60] The noncitizen filed a petition for review with the Second Circuit Court of Appeals, which subsequently granted him a stay of removal.[61] While his petition for review was pending, the U.S. District Court for the Middle District of Pennsylvania granted a writ of habeas corpus in part.[62] Part of the challenge to his detention by DHS included a request that he be released in order to appear before the state court for proceedings related to his post-conviction petition since DHS had refused to transfer him back to state custody despite the order issued by the state court for DHS to produce him for the state court hearing.[63]

In a decision addressing a direct appeal of a conviction for illegal reentry after removal under 8 USCA §1326, the Tenth Circuit Court of Appeals reviewed an argument by the noncitizen that the immigration judge and the BIA had improperly denied his motion for a continuance pending a decision by the state court regarding his motion to vacate his guilty plea.[64] The Tenth Circuit held that the noncitizen had not been deprived of the opportunity for judicial review of his removal order as he had exercised his right to appeal the denial to the BIA and did not seek further judicial review.[65] In the particular set of circumstances presented, the Tenth Circuit also noted that, since he had been ordered removed, the U.S. Supreme Court had issued *Padilla v. Kentucky* and the noncitizen could seek to vacate his conviction pursuant to *Padilla v. Kentucky* albeit in another forum.[66]

Where represented noncitizens failed to provide any evidence of pending criminal court proceedings based on *Padilla v. Kentucky*, the Board has denied their appeals based on arguments that the immigration judges

improperly denied their motions for continuances.[67] As noted above, cases should be properly documented and legal issues fully presented before the immigration court and the Board to preserve all issues for judicial review.

Motions to Terminate Removal or Deportation Proceedings

Where a noncitizen has provided the appropriate documentation from the criminal proceedings to demonstrate that his or her prior guilty plea was not knowing, intelligent, and voluntary and the conviction has been vacated, the Board has granted motions to terminate removal proceedings.[68] The Eleventh Circuit reversed the Board where a conviction was vacated based on an underlying defect in the criminal proceedings.[69] In its decision, the Eleventh Circuit noted that defense counsel's affirmative misadvice about the immigration consequences of a guilty plea in state criminal proceedings "probably" implicated a federal right.[70]

Motions to Reopen Removal or Deportation Proceedings

The Board has also granted motions to reopen and reversed immigration judge decisions which have denied motions to reopen where the conviction underlying the removal order has been vacated.[71]

The federal circuit courts of appeals are beginning to review cases involving *Padilla v. Kentucky*. For cases arising within the jurisdiction of the Sixth Circuit Court of Appeals, DHS has the burden to prove that following the vacatur of a conviction granted under *Padilla v. Kentucky*, any conviction remains to enable the immigration judge to sustain a finding of deportability.[72]

Before the U.S. Supreme Court decided *Padilla v. Kentucky*, the Board had held that, where a conviction has been vacated for defects in the underlying criminal proceedings, it can no longer form the basis for a removal order.[73] Such defects have included vacaturs where the state court failed to provide a mandatory advisal about possible immigration consequences of a guilty plea to a noncitizen prior to the entry of a plea.[74]

The Fifth Circuit has also considered *Padilla v. Kentucky* in two unpublished decisions following remand of two criminal cases by the U.S. Supreme Court.[75] In the first unpublished decision, the Fifth Circuit vacated a federal district court decision in which a petition for a writ of coram nobis had been denied and remanded the case for additional proceedings to the district court.[76] In the second case, the Fifth Circuit noted that a claim of ineffective assistance of counsel under *Padilla v. Kentucky* cannot be brought on direct appeal but instead can be brought in a motion under 28 USCA § 2255.[77] These decisions are noteworthy because the Fifth Circuit had previously held in *Renteria-Gonzalez v. INS* that where a conviction has been vacated based on defects in the underlying criminal proceeding, the noncitizen remains convicted for immigration purposes.[78] The Fifth Circuit has since distinguished its *Renteria-Gonzalez* decision,[79] including in *Discipio v. Ashcroft*,[80] where the Attorney General modified its litigation position during the petition for rehearing en banc and requested that the case be remanded to the Board of Immigration Appeals for termination under *Matter of Pickering*.[81] It appears that motions to reopen prior deportation and removal proceedings may be possible for noncitizens whose proceedings took place within the jurisdiction of the Fifth Circuit.

Conclusion

As demonstrated above, the litigation regarding the applicability and implementation of *Padilla v. Kentucky* will continue. In states where the highest state courts have ruled that a noncitizen cannot pursue a form of post-conviction relief after the completion of a sentence, new state legislation may be needed for a procedural mechanism or change in the substantive law for the implementation of *Padilla v. Kentucky*.

Moving forward, the criminal defense and immigration bars should continue to work together on cases involving noncitizens. To avoid post-conviction challenges to pleas, accurate advisals by defense counsel must be provided prior to the entry of a plea by a noncitizen. Efforts by defense counsel to negotiate the charge during the plea bargaining process are also critical. As the U.S. Supreme Court noted in its *Padilla v. Kentucky* decision:

> Finally, informed consideration of possible deportation can only benefit both the state and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense

that does not mandate that penalty in exchange for a dismissal of a charge that does.[82]

Fundamental fairness and effective assistance of counsel under the Sixth Amendment of the U.S. Constitution require no less.

Notes

[1] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010), analyzed in 87 Interpreter Releases 729 (April 5, 2010). For a discussion about the due process issues raised by the Supreme Court throughout the years prior to *Padilla* and the decision, see Baldini-Potermin, "Fundamental Fairness through the Lens of the Supreme Court: From 1996 to *Padilla*," 87 Interpreter Releases 1013 (May 17, 2010). For a thorough discussion of the issues as presented in the briefing before the U.S. Supreme Court, M. Baldini-Potermin, "Supreme Court To Address Immigration Consequences of Criminal Dispositions and Claims of Ineffective Assistance of Counsel in *Padilla v. Kentucky*," 86 Interpreter Releases 2189 (Sept. 4, 2009).

[2] *Cf. U.S. v. Cerna*, 603 F.3d 32, 36 (2d Cir. 2010) (reversing the district court, which had denied a motion to dismiss an indictment under 8 USCA §1326 for illegal reentry after deportation based on ineffective assistance of counsel in the underlying deportation proceedings and remanding for further proceedings), with *U.S. v. Rubio*, 629 F.3d 490 (5th Cir. 2010) (affirming district court sentence where noncitizen failed to prove that he did not knowingly waive his right to counsel in the underlying criminal proceeding); *People v. Garcia*, 29 Misc. 3d 756, 907 N.Y.S.2d 398 (Sup 2010) (holding that defense counsel's advice to noncitizen defendant to seek immigration advice, without more, and the legally deficient advice that the defendant subsequently received from a paralegal did not meet defense counsel's *Padilla* obligations where the immigration consequences were straightforward; motion to vacate was granted, and case was restored to the trial court's calendar for further proceedings on the indictment), with *People v. Carrera*, 239 Ill. 2d 241, 346 Ill. Dec. 507, 940 N.E.2d 1111 (2010) (holding that deportation proceedings do not constitute "imprisonment" for purposes of the Post-Conviction Hearing Act and that deportation proceedings are not a consequence relating to a sentence imposed based on a plea). A chart of published state and federal case law regarding *Padilla v. Kentucky* is available in Kesselbrenner and Rosenberg, Immigration Law and Crimes § 4:3.50. The chart is updated twice a year.

[3] Due to the wide variance for motions among state laws and procedures to vacate guilty pleas and post-conviction petitions (i.e., petitions for writs of coram nobis, coram vobis, and habeas corpus) among the 50 states, Washington, D.C., Puerto Rico, and territories of the U.S., a discussion of the particular state or local procedures will be noted only where relevant for published precedent. There are hundreds of unpublished opinions which cite to *Padilla v. Kentucky*.

[4] See *Judulang v. Gonzales*, 249 Fed. Appx. 499 (9th Cir. 2007), cert. granted, 2011 WL 1457529 (U.S. 2011).

[5] The petition for a writ of certiorari in *Judulang v. Holder* is available on Westlaw at 2010 WL 4852442, the Solicitor General's opposition is available on Westlaw at 2011 WL 757935 as well as on the U.S. Supreme Court's Blog website at http://www.scotusblog.com/2011/04/details-on-this-morning%e2%80%99s-orders/.

[6] The Second Circuit reversed the Board of Immigration Appeals' decision, *Matter of Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005), discussed in 82 Interpreter Releases 657 (Apr. 18, 2005), in which the Board had held that a noncitizen charged as being deportable under the 1996 definition of an aggravated felony for sexual abuse of a minor under INA §101(a)(43)(A) [8 USCA §1101(a)(43)(A)] was ineligible for a § 212(c) waiver. See *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007), discussed in 84 Interpreter Releases 1524 (July 9, 2007), overruling *Matter of Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005). Subsequent to *Matter of Blake*, the Board issued another precedent decision finding that a noncitizen charged with being deportable under the 1996 definition of an aggravated felony for a crime of violence for which a term of imprisonment of at least one year had been imposed under INA §101(a)(43)(F) [8 USCA §1101(a)(43)(F)] was also ineligible for a § 212(c) waiver. See *Matter of Brieva-Perez*, 23 I. & N. Dec. 766, 2005 WL 1352038 (B.I.A. 2005), examined in 82 Interpreter Releases 988 (June 13, 2005). The First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have affirmed *Matter of Blake* and *Matter of Brieva-Perez*. See *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. 2006), summarized in 83 Interpreter Releases 2587 (Dec. 4, 2006); *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007); *Vo v. Gonzales*, 482 F.3d 363 (5th Cir. 2007), discussed in 84 Interpreter Releases 854 (Apr. 9, 2007); *Thap v. Mukasey*, 544 F.3d 674 (6th Cir. 2008), summarized in 85 Interpreter Releases 2831, 2832 (Oct. 27, 2008); *Morgan v. Keisler*, 507 F.3d 1053, 1060 (6th Cir. 2007), summarized in 84 Interpreter Releases 2650 (Nov. 12, 2007); *Koussan v. Holder*, 556 F.3d 403 (6th Cir. 2009), discussed in 86 Interpreter Release 576 (Feb. 23, 2009); *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007), summarized in 84 Interpreter Releases 254 (Jan. 29, 2007); *Frederick v. Holder*, 2011 WL 1642811 (7th Cir. 2011), summarized in 88 Interpreter Releases 1274, 1278 (May 16, 2011); *Zamora-Mallari v. Mukasey*, 514 F.3d 679 (7th Cir. 2008), summarized in 85 Interpreter Releases 436 (Feb. 11, 2008); *Soriano v. Gonzales*, 489 F.3d 909 (8th Cir. 2006); *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007), summarized in 84 Interpreter Releases 1909, 1910 (Aug. 20, 2007) (declining to follow the Second Circuit's *Blake* decision); *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009), cert. denied, 130 S. Ct. 3272, 176 L. Ed. 2d 1182 (2010); and *De la Rosa v. U.S. Attorney General*, 579 F.3d 1327 (11th Cir. 2009), summarized in 87 Interpreter Releases 2148, 2154 (Aug. 31, 2009), cert. denied, 130 S. Ct. 3272, 176 L. Ed. 2d 1182 (2010), discussed in 87 Interpreter Releases 1056 (June 7, 2010). The Fifth, Sixth, and Eleventh Circuits had held prior to the Supreme Court's *St. Cyr* decision that the comparable grounds requirement applied. See *Gjonaj v. I.N.S.*, 47 F.3d 824, 827 (6th Cir. 1995); *Rodriguez-Padron v. I.N.S.*, 13 F.3d 1455, 1459 (11th Cir. 1994); *Chow v. I.N.S.*, 12 F.3d 34, 38 (5th Cir. 1993), summarized in 71 Interpreter Releases 567 (Apr. 25, 1994).

[7] *St. Cyr*, discussed in 78 Interpreter Releases 1057 (July 2, 2001), held that Congress' restrictions on, and ultimate repeal, of § 212(c) cannot be applied retroactively to aliens who had, before the 1996 legislative enactments, relied on the availability

of § 212(c) in pleading guilty to offenses making them removable.

[8] *Strickland v. Washington*, 466 U.S. 668 (1984).

[9] *Teague v. Lane*, 489 U.S. 288, 310 (1989).

[10] See *Doan v. U.S.*, 2011 WL 116811 (E.D. Va. 2011), summarized in 88 Interpreter Releases 409, 415 (Jan. 31, 2011).

[11] See *U.S. v. Chaidez*, 730 F. Supp. 2d 896 (N.D. Ill. 2010) (granting an evidentiary hearing to noncitizen regarding her petition for a writ of coram nobis). Note: Following an evidentiary hearing, the noncitizen's petition for a writ of coram nobis was granted and the conviction was vacated. See *U.S. v. Chaidez*, 2010 WL 3979664 (N.D. Ill. 2010), summarized in 88 Interpreter Releases 409, 415 (Jan. 31, 2011).

[12] See *Miller v. State*, 196 Md. App. 658, 11 A.3d 340 (2010).

[13] See *Campos v. State*, 2011 WL 1833091 (Minn. Ct. App. 2011).

[14] See *Campos v. State*, 2011 WL 1833091 at *1-2 (Minn. Ct. App. 2011) (discussing *Alanis v. State*, 583 N.W.2d 573 (Minn. 1998)).

[15] See *State v. Gaitan*, 419 N.J. Super. 365, 17 A.3d 227 (App. Div. 2011).

[16] See *State v. Gaitan*, 419 N.J. Super. 365, 365, 17 A.3d 227 (App. Div. 2011).

[17] See *State v. Golding*, 2011 WL 1835274 at *8-11 (Tex. App. Houston 1st Dist. 2011) (citing *Strickland v. Washington*, 466 U.S. 668 (1984), and distinguishing it from *Teague v. Lane*, 489 U.S. 288, 310 (1989)).

[18] See *State v. Golding*, 2011 WL 1835274 at *5-6 (Tex. App. Houston 1st Dist. 2011). The court of appeals also found the 16-year passage of time between the date of the plea and the date of the filing of the petition for a writ of habeas corpus was not unreasonable as the noncitizen filed the petition soon after the U.S. Supreme Court issued its *Padilla* decision, thus demonstrating his due diligence in seeking relief.

[19] See *People v. Kazadi*, 2011 WL 724754 at *2-3 (Colo. App. 2011) (citing and discussing *Padilla v. Kentucky* and *People v. Pozo*, 746 P.2d 523, 525–26 (Colo. 1987), and finding that the *Padilla* decision could not lower the requirement for an accurate immigration consequences advisal under the state constitution).

[20] See *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

[21] See *U.S. v. Bonilla*, 637 F.3d 980 (9th Cir. 2011), summarized in 88 Interpreter Releases 788, 792 (Mar. 12, 2011).

[22] Id.

[23] *Bonilla*, 466 U.S. at 983.

[24] *Bonilla*, 466 U.S. at 984-985 (reasoning that it was plausible that the attorney's silence regarding the wife's question could have motivated him to plead guilty and finding that as soon as the noncitizen discovered the consequences prior to being sentenced, he filed a motion to withdraw his plea).

[25] See *State v. Golding*, 2011 WL 1835274 at *12-13 (Tex. App. Houston 1st Dist. 2011). The court of appeals also found that it was sufficient for the noncitizen to demonstrate that he "may suffer collateral legal consequences from his misdemeanor conviction" to invoke habeas jurisdiction under state law. See id. at *3.

[26] See *State v. Sandoval*, 171 Wash. 2d 163, 249 P.3d 1015 (2011).

[27] Id.

[28] See *State v. Nunez-Valdez*, 200 N.J. 129, 144, 975 A.2d 418, 427 (2009) ("We agree that further refinement of the plea form is needed. We approve of the suggestion of the ACDL [Association of Criminal Defense Lawyers] and the ACLU [American Civil Liberties Union] that the plea form should inform a non-citizen defendant that 'if your plea of guilty is to a crime considered an aggravated felony under federal law you will be subject to deportation/removal' and that the form should instruct defendants of their right to seek legal advice regarding their immigration status. Further, it is preferable that the trial court inquire directly of defendant regarding his knowledge of the deportation consequences of his plea. We direct the Criminal Practice Committee and the Administrative Director to revise the plea form to include the above.").

[29] See *Neufville v. State*, 13 A.3d 607 (R.I. 2011).

[30] See *State v. Golding*, 2011 WL 1835274 at *12-13 (Tex. App. Houston 1st Dist. 2011). The court of appeals also found that it was sufficient for the noncitizen to demonstrate that he "may suffer collateral legal consequences from his misdemeanor conviction" to invoke habeas jurisdiction under state law. See id. at *3.

[31] *People v. Kazadi*, 2011 WL 724754 at *5-6 (Colo. App. 2011) (remanding the case for an evidentiary hearing on the issue of ineffective assistance of counsel).

[32] See *Flores v. State*, 57 So. 3d 218 (Fla. Dist. Ct. App. 4th Dist. 2010).

[33] *Flores,* 57 So. 3d at 220.

[34] See *People v. Contant*, 77 A.D.3d 967, 910 N.Y.S.2d 482 (2d Dep't 2010).

[35] See *State v. Sandoval*, 171 Wash. 2d 163, 249 P.3d 1015 (2011).

[36] *People v. Kazadi*, 2011 WL 724754 at *5-6 (Colo. App. 2011). But see *People v. Kazadi*, 2011 WL 724754 at *7-12 (Colo. App. 2011) (J. Taubman, concurring and dissenting in part) (finding that the entry of a deferred judgment should be considered to have rendered the disposition final for purposes of federal immigration law and state law to allow the noncitizen the opportunity to pursue post-conviction relief and avoid a "catch-22" in which he could be deported but not be able to litigate his claim of ineffective assistance of counsel for the felony offense).

[37] See *U.S. v. Rubio*, 629 F.3d 490 (5th Cir. 2010).

[38] See *Bautista v. U.S.*, 10 A.3d 154, 157 (D.C. 2010).

[39] See *Com. v. Grannum*, 457 Mass. 128, 928 N.E.2d 339 (2010).

[40] *Grannum*, 928 N.E.2d at 340.

[41] See *Campos v. State*, 2011 WL 1833091 at *5-6 (Minn. Ct. App. 2011) (noting that the 2006 amendment to the Minnesota Rules of Criminal Procedure did not need to be addressed as it had not been properly raised and briefed before the day of oral argument).

[42] See *State v. Lopez*, 794 N.W.2d 379, 383-85 (Minn. Ct. App. 2011) (stating that *Padilla v. Kentucky* was cited for its recognition of the gravity of the immigration consequences of a plea).

[43] *Lopez,* 794 N.W.2d at 385.

[44] See *Padilla v. Kentucky*, 130 S. Ct. at 1481.

[45] See *People v. Carrera*, 239 Ill. 2d 241, 346 Ill. Dec. 507, 940 N.E.2d 1111, 1120 (2010).

[46] See *People v. Carrera*, 239 Ill. 2d 241, 346 Ill. Dec. 507, 940 N.E.2d 1111, 1112-13 (2010).

[47] *Carrera*, 940 N.E.2d at 1113.

[48] *Carrera*, 940 N.E.2d at 1118-20.

[49] Id.

[50] See *Com. v. Morris*, 281 Va. 70, 705 S.E.2d 503 (2011).

[51] *Morris*, 281 Va. at 79-80.

[52] See *Com. v. Morris*, 281 Va. 70, 81-83, 705 S.E.2d 503 (2011) (emphasis in original, citing *Dobie v. Com.*, 198 Va. 762, 769, 96 S.E.2d 747, 752 (1957)).

[53] Id.

[54] *Morris*, 281 Va. at 80.

[55] See *Smith v. State*, 287 Ga. 391, 697 S.E.2d 177 (2010).

[56] Id.

[57] Art. 36, Vienna Convention on Consular Relations, 21 U.S.T. 77 (Dec. 14, 1969).

[58] See *Baires v. U.S.*, 707 F. Supp. 2d 656, 664, fn. 6 (E.D. Va. 2010).

[59] See *In re Peguero a.k.a. Peguero Sanchez*, 2010 WL 3027606 (B.I.A. 2010).

[60] Id.

[61] See *Peguero v. Thomas, et al.*, 11-cv-585, at *3 (M.D. Pa. 2011).

[62] Id. at *10-15.

[63] Id. at *3.

[64] See *U.S. v. Adame-Orozco*, 607 F.3d 647 (10th Cir. 2010).

[65] Id.

[66] *Adame-Orozco*, 607 F.3d at 650.

[67] See, e.g., *In re Gomez-Hernandez*, 2011 WL 1570489 (B.I.A. 2011); *In re Jetalkumar Bipinbahi Patel*, A041 336 447, 2011 WL 1570486 (BIA 3/31/2011). In such cases, noncitizens may have claims of ineffective assistance of counsel against their immigration counsel. See *Matter of Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988), discussed in 65 Interpreter Releases 994 (Sept. 26, 1988), aff'd *Lozada v. I.N.S.*, 857 F.2d 10 (1st Cir. 1988); *Matter of Compean*, 25 I. & N. Dec. 1, 2009 WL 1570283 (A.G. 2009).

[68] See *In re Belizaire,* 2011 WL 1373413 (B.I.A. 2011).

[69] See *Garces v. U.S. Atty. Gen.*, 611 F.3d 1337 (11th Cir. 2010), summarized in 87 Interpreter Releases 1559, 1565 (Aug. 9, 2010).

[70] *Garces*, 611 F.3d at 1345, fn. 7 (citing *Padilla v. Kentucky*). This case is particularly noteworthy because the Eleventh Circuit dismissed hearsay in police reports and found that there was not enough evidence under the "reason to believe" standard that the noncitizen had been involved in drug trafficking. See id. at 1345-50.

[71] See *In re Pyzik Chmura*, 2010 WL 4500863 (B.I.A. 2010) (citing *Barakat v. Holder*, 2010 WL 3543134 (6th Cir. 2010), summarized in 87 Interpreter Releases 1890, 1896 (Sept. 27, 2010), in which the Sixth Circuit held that DHS has the burden to prove that where a noncitizen's conviction was vacated under *Padilla v. Kentucky*, any conviction remains to sustain a finding of removability). Note: *Barakat v. Holder* has since been published as precedent and is binding on the Board and the immigration judges who adjudicate cases arising within the jurisdiction of the Sixth Circuit Court of Appeals. See *Barakat v. Holder*, 621 F.3d 398 (6th Cir. 2010), redesignated as opinion and publication ordered, (Sept. 9, 2010).

[72] See *Barakat v. Holder*, 621 F.3d 398 (6th Cir. 2010), redesignated as opinion and publication ordered, (Sept. 9, 2010).

[73] See *Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512, 1999 WL 126433 (B.I.A. 1999), discussed in 76 Interpreter Releases 518 (Apr. 2, 1999) (holding that where a conviction has been vacated solely for immigration purposes or based on a state rehabilitative statute, it remains a conviction for federal immigration law), review granted, order vacated, 222 F.3d 728 (9th Cir. 2000) (reversing the Board regarding state first offender dispositions that are the equivalent of dispositions under the Federal First Offender Act (FFOA), 18 USCA § 3607). Note: The Ninth Circuit is reconsidering the holding in its *Lujan-Armendariz* decision. See *Nunez-Reyes v. Holder*, 602 F.3d 1102 (9th Cir. 2010), reh'g en banc granted, 631 F.3d 1295 (9th Cir. 2010). Oral argument was held on December 14, 2010. For criminal and juvenile delinquency charges arising within the states in the jurisdiction of the Ninth Circuit Court of Appeals, defense counsel should review the practice advisory, Brady, "Important Advice for Defending Non-Citizens' First Drug Possession," Immigrant Legal Resource Center, Sept. 29, 2010, available at http://www.ilrc.org/immigration_law/criminal_and_immigration_law.php.

[74] See *Matter of Adamiak*, 23 I. & N. Dec. 878 (B.I.A. 2006), discussed in 83 Interpreter Releases 391 (Feb. 27, 2006).

[75] See *Chapa v. U.S.*, 130 S. Ct. 3504 (2010); *Santos-Sanchez v. U.S.*, 130 S. Ct. 2340 (2010).

[76] See *Santos-Sanchez v. U.S.*, 381 Fed. Appx. 419 (5th Cir. 2010).

[77] See *U.S. v. Chapa*, 394 Fed. Appx. 53 (5th Cir. 2010).

[78] See *Renteria-Gonzalez v. I.N.S.*, 322 F.3d 804, 812-14 (5th Cir. 2002).

[79] See *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 461-63 (5th Cir. 2006), summarized in 83 Interpreter Releases 1954 (Sept. 11, 2006) (finding that a Kansas court's judgment nunc pro tunc that corrected the section of law under which the noncitizen was convicted was the operative judgment rather than the original judgment); *Discipio v. Ashcroft*, 417 F.3d 448 (5th Cir. 2005).

[80] See *Discipio v. Ashcroft*, 417 F.3d 448, 449-50 (5th Cir. 2005).

[81] See *Matter of Pickering*, 23 I. & N. Dec. 621, 2003 WL 21358480 (B.I.A. 2003), discussed in 80 Interpreter Releases 1509, 1510 (Nov. 3, 2003).

[82] *Padilla v. Kentucky*, 130 S. Ct. at 1486. ■

1. Ninth Circuit Issues New Decision in *Irigoyen-Briones,* Finds BIA Erred in Ruling that It Lacked Jurisdiction to Extend Time for Filing Appeal

The U.S. Court of Appeals for the Ninth Circuit has issued a new decision in *Irigoyen-Briones v. Holder* addressing whether the 30-day deadline for filing a notice of appeal with the Board of Immigration Appeals (BIA or Board) is jurisdictional, *Irigoyen-Briones v. Holder,* 2011 WL 2119908 (9th Cir. May, 31, 2011) (*Irigoyen-Briones III*). In *Irigoyen-Briones v. Holder*, 582 F.3d 1062 (9th Cir. 2009) (*Irigoyen-Briones I*),[83] two members of the three-member panel previously ruled, over a vigorous dissent, that U.S. Supreme Court precedent required it to defer to the Board's interpretation of 8 CFR § 1003.38(b), which provides that a notice of appeal "shall be filed directly with the Board … within 30 calendar days after the Immigration Judge renders a decision" where the notice of appeal was received by the Board one day late due to the overnight carrier's failure to deliver it when promised and the Board held that it lacked jurisdiction to extend the filing deadline despite the Ninth Circuit's decision to the contrary in *Oh v. Gonzales*, 406 F.3d 611 (9th Cir. 2005).[84] A petition for rehearing en banc, and a call for rehearing en banc and exchange of memoranda within the court, led the panel to reconsider its views, and the September 29, 2009, opinion in *Irigoyen-Briones I* and its companion case, *Turcios v. Holder*, 582 F.3d 1075 (9th Cir. 2009), were vacated, *Irigoyen-Briones v. Holder*, 608 F.3d 491 (9th Cir. 2010) (*Irigoyen-Briones II*), and *Turcios v. Holder*, 608 F.3d 491 (9th Cir. 2010).[85]

The court in *Irigoyen-Briones III,* in an opinion written by Circuit Judge Andrew J. Kleinfeld, the dissenter in *Irigoyen-Briones I,* for the panel, which included Circuit Judges Milan D. Smith, Jr. and Eugene E. Siler, Jr.,[86] agreed with the petitioner that the BIA's determination that it lacked jurisdiction was incorrect.

The petitioner, Guillermo Irigoyen-Briones, a native and citizen of Mexico, illegally entered the U.S. in 1991. In November 2003, U.S. Immigration and Customs Enforcement (ICE) commenced removal proceedings against him, charging him pursuant to INA § 212(a)(6)(A)(i) [8 USCA § 1182(a)(6)(A)(i)] with removability as an alien present in the U.S. without being admitted or paroled. At a hearing before an IJ in December 2003, the petitioner admitted the allegations and conceded removability. In October 2004, he filed an application for cancellation of removal or, in the alternative, for voluntary departure, both of which the IJ denied in December 2006. Thereafter, the petitioner engaged counsel, and, on January 18, 2007, the petitioner's counsel filed a notice of appeal (NOA) with the BIA, which the BIA dismissed as untimely because, pursuant to 8 CFR § 1003.38(b), the NOA was due one day earlier, on January 17, 2007.

In March 2007, the petitioner filed a motion for reconsideration or, in the alternative, for the BIA to certify the appeal to itself. He argued that the BIA had jurisdiction over his untimely appeal in light of the "rare circumstances" exception explained in *Oh v. Gonzales* and *Zhong Guang Sun v. U.S. Department of Justice*, 421 F.3d 105 (2d Cir. 2005).[87] In support of this motion, the petitioner's counsel stated that, after she was retained on January 8, 2007, she made an appointment with the immigration court on January 11, 2007, to listen to the tape recordings of the IJ proceedings and that, upon opening the envelope containing the tapes, she was surprised to find that there were (at least) five tapes, which included a rather long oral decision by the IJ, and that she needed to research a few legal issues before she could write the NOA with enough specificity so that it would not be summarily dismissed. She completed this additional research and prepared the NOA by the end of the day January 13, 2007, and was aware that there would be no mail service on January 14 or 15, 2007, because the 14th was a Sunday and the 15th was Dr. Martin Luther King, Jr. Day. Therefore, she went to the U.S. Post Office the morning of January 16, 2007, and mailed the NOA via the U.S. Postal Service's (USPS') express mail delivery service, which guaranteed delivery of the NOA to the BIA on the due date of January 17, 2007. She also noted that, in her over 10 years of experience using USPS for overnight deliveries, she had never before had a document delivered late. She also states, "USPS, through its agent with whom [she] spoke by telephone, admits that it failed in delivering the Express Mail package as guaranteed and

indicates that they will provide a refund upon request at any post office."

In denying the motion for reconsideration, the BIA concluded that the regulation requires the NOA to be filed with the Board within 30 days, not given to the USPS or other carrier within that time, and that the Board lacked the authority to extend that filing period. The petitioner sought review in the court of appeals.

The Ninth Circuit in *Irigoyen-Briones III* began by noting that the statute provides that "the Attorney General shall issue regulations with respect to … the time period for the filing of administrative appeals in deportation proceedings …"[88] and that 8 CFR § 1003.38(b) provides that the notice of appeal "shall be filed directly with the Board of Immigration Appeals within 30 calendar days." Neither the statute nor the implementing regulation, the court pointed out, uses the word "jurisdiction." The court then noted that it had construed this filing requirement in *Oh v. Gonzales* where the petitioner also delivered her papers for overnight delivery, but the express delivery service erred and delivered them a day late. There the court held that the BIA's position, that it had no authority to accept the late filing because the deadline was jurisdictional, was erroneous as a matter of law, reasoning that the regulation did not say that it was jurisdictional and, because the BIA, despite its "jurisdictional" argument, claimed authority to excuse late filings in "rare circumstances" and prior Ninth Circuit authorities likewise had held that in "unique circumstances" lateness was excusable, the BIA's denial of Oh's motion for reconsideration was an abuse of discretion. The court held that the BIA "jurisdiction" position was a "misconstruction of the jurisdictional nature of its own filing deadline," amounting to "legal error" rendering its discretionary decision "arbitrary, irrational, or contrary to law." The court also noted that the Second Circuit reached the same conclusion in *Zhong Guang Sun v. U.S. Department of Justice*, supra. The Second Circuit in that case noted that the agency itself "strongly encouraged" aliens and their counsel to use overnight delivery services.[89]

The BIA expressly rejected *Oh* and *Zhong* in *Matter of Liadov*, 23 I. & N. Dec. 990 (B.I.A. 2006),[90] which also involved a delivery service error resulting in papers being delivered one day late, finding that it lacked the "authority" to extend the time for filing. The Board argued in the present case that the Ninth Circuit had to defer to its decision in *Liadov* and treat *Oh* as overruled under *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), and subsequent Supreme Court authority holding that jurisdictional deadlines are not subject to equitable exceptions.[91]

In *Brand X*, the Supreme Court held that a court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron*[92] deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.[93] The Ninth Circuit acknowledged that it was therefore required to defer to the Board's decision in *Liadov* if the statute is ambiguous and the BIA's interpretation reasonable, but concluded that subsequent Supreme Court authority compelled it to conclude that the statute is not ambiguous and is not jurisdictional but, rather, is a claim-processing rule, citing *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (holding that only Congress may determine a lower federal court's subject-matter jurisdiction and noting that the general rule is that "the label 'jurisdictional' [is] not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority)," *Scarborough v. Principi*, 541 U.S. 401, 414 (2004) (holding that time prescriptions should generally be classified as claim-processing rules rather than jurisdictional rules, so the 30-day deadline for seeking attorneys fees was not jurisdictional), and *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197 (2011) (holding that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity and that filing deadlines are "quintessential claim-processing rules" that "should not be described as jurisdictional.").

Since Congress did not set the 30-day time limit at issue, the regulation does not say that it is jurisdictional, and the BIA itself does not treat it as jurisdictional since it may sua sponte decide to exercise its authority where the reasons for the lateness are "extraordinary,"[94] the court concluded that the BIA's rejection of its decision in *Oh* and its jurisdictional interpretation of its regulation in the current matter were mistaken as a matter of law, the statute is not ambiguous, and the BIA's decision is not entitled to deference.

The court also noted that the Board could obviate the filing difficulties for aliens outside the beltway who cannot afford to send their attorneys to Falls Church, Virginia, to file their notices of appeal in person (the only way that they have to ensure that the notice is timely filed since, relying on the courier's "guarantee" affords them no comfort if the carrier fails to live up to that guarantee and the Board has refused to allow filing within a reasonable distance of the alien's residence or to provide for electronic filing) by allowing electronic filing. The court found it "a cruel irony that the Board publishes its manual that lawyers are supposed to use as guidance on the internet, yet pretends the internet does not exist when it comes to receiving papers."

The petition for review was granted, the Board's decision vacated, and the case remanded.

Charles E. Nichol, San Francisco, California, appeared for the petitioner. Charles E. Canter, U.S. Department of Justice, Washington, D.C., argued the case for the government, and Luis E. Perez, U.S. Department of Justice, was on the brief.

Notes

[83] See 86 Interpreter Releases 2474 (Oct. 5, 2009).

[84] *Oh* is summarized in 82 Interpreter Releases 819, 821 (May 16, 2005).

[85] See 87 Interpreter Releases 1174 (June 14, 2010).

[86] Senior U.S. circuit judge for the Sixth Circuit, sitting by designation.

[87] In *Zhong Guang Sun*, the Second Circuit (in agreement with the Ninth Circuit in *Oh*) held that an overnight delivery service's failure to timely deliver an NOA can constitute an extraordinary circumstance excusing a petitioner's failure to comply with the 30-day limit for filing an appeal. The petitioner in *Zhong Guang Sun* placed his NOA with an overnight delivery service one day before the deadline for filing an appeal. The Second Circuit stated that a petitioner's use of an overnight delivery service is recognized as a way of ensuring timely delivery and strongly suggests that the failure of such an effort to achieve timely filing may well, indeed, fall within the realm of the extraordinary. As a result, the Second Circuit remanded the case for the BIA to reconsider the issue.

[88] Immigration Act of 1990, Pub. L. No. 101-649, § 545(d)(2), 104 Stat. 4978, 5066 (1990).

[89] See the Board of Immigration Appeals Practice Manual § 3.1.

[90] *Matter of Liadov* is discussed in 83 Interpreter Releases 1981 (Sept. 18, 2006).

[91] See *Bowles v. Russell*, 551 U.S. 205, 213–14 (2007) (overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964)).

[92] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[93] *Brand X*, 545 U.S. at 982–83.

[94] See, e.g., *Matter of Slade*, 10 I. & N. Dec. 128, 128 (B.I.A. 1962) (certifying untimely appeal in light of important issue of statutory construction). ■

2.DOS Issues July Visa Bulletin; Advances Seen in Some Employment-Based Preference Categories

The Department of State's (DOS') Visa Office (VO) has released the visa numbers for the month of July.

The Family First Preference (unmarried sons and daughters of U.S. citizens) for all areas except Mexico and the Philippines remained at May 1, 2004. The cut-off for the Philippines advanced nearly two months to April 15, 1996. The Mexico date advanced one week to March 8, 1993. The Family 2A Second Preference (spouses and children of permanent residents) for all areas except Mexico advanced over seven months to March 22, 2008. The cutoff for Mexico advanced nearly seven months to February 15, 2008. The Family 2B Second Preference (unmarried sons and daughters, 21 years of age or older, of permanent residents) advanced 11 weeks to stand at July 1, 2003, for all areas except Mexico, which advanced one month to September 22, 1992, and the Philippines, which advanced over three months to September 22, 2000. The Family Third Preference (married sons and daughters of U.S. citizens) advanced over six weeks to July 15, 2001, for all areas except Mexico, which remained at November 15, 1992, and the Philippines, which advanced two weeks to March 22, 1992. The Worldwide Family Fourth Preference (brothers and sisters of U.S. citizens), the mainland-born China Fourth Preference, and the India Fourth Preference remained at March 8, 2000. For Mexico, it advanced two weeks to March 1, 1996. For the Philippines, it advanced two weeks to May 15, 1988.

The Visa Bulletin for July includes the following relating to the family numbers:

> NOTE: For July, F2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 15FEB08. F2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 15FEB08 and earlier than 22MAR08. (All F2A numbers provided for MEXICO are exempt from the per-country limit; there are no F2A numbers for MEXICO subject to per-country limit.)

The Employment First Preference category remained current for all chargeability areas and the Second Preference cutoff for all areas except China mainland-born and India, which each advanced over four months to stand at March 8, 2007, also remained current.

The Employment Third Preference category for Mexico advanced over six months to July 1, 2005. The cutoff date for India advanced over one week to May 1,

2002. The cutoff for mainland-born China advanced nearly seven weeks to July 1, 2004. The cutoff for the Philippines and all other chargeability areas advanced three weeks to October 8, 2005. For the Third Preference Other Workers category, the Worldwide, Mexico and the Philippines cut-off dates advanced over one year to November 22, 2004. China mainland-born remained at April 22, 2003. The cut-off date for India advanced over one week to May 1, 2002. The Fourth Preference categories, including the Certain Religious Workers category and the Fifth Preference category, including the Targeted Employment Areas category and the Fifth Preference Pilot Program, remain current.

For July, immigrant visa numbers in the diversity visa (DV) category are available to qualified DV-2011 applicants chargeable to all regions and eligible countries as follows (visas are available only for applicants with DV lottery rank numbers below the cut-off number): Africa: 57,600, except Egypt: 35,000, Ethiopia: 30,650, and Nigeria: 18,500; Asia: 33,775; Europe: 33,000, except Uzbekistan: 28,200; North America (Bahamas): 12; Oceania: 1,400; South America and the Caribbean: 1,400.

The VO also released the DV numbers for August. For August, immigrant visa numbers in the DV category are available to qualified DV-2011 applicants chargeable to all regions and eligible countries as follows (visas are available only for applicants with DV lottery rank numbers below the cut-off number): Africa: 71,800, except Ethiopia: 32,400; Asia: 39,750; Europe: CURRENT, except Uzbekistan: UNAVAILABLE; North America (Bahamas): CURRENT; Oceania: CURRENT; South America and the Caribbean: CURRENT.

The visa chart for July is reproduced in Appendix I of this Release. The Visa Bulletin, including the monthly chart, may be obtained via the Internet. Go to http://travel.state.gov, and then select "Visa Bulletin." ■

3. DHS May Place Arriving Alien in § 240 Removal Proceedings and IJ Has Jurisdiction over Arriving Cuban Aliens' Removal Proceedings, BIA Rules

As previously reported,[95] the Board of Immigration Appeals (BIA or Board) has held that (1) INA § 235(b)(1)(A)(i) [8 USCA § 1225(b)(1)(A)(i)] (2006) does not limit the prosecutorial discretion of the Department of Homeland Security (DHS) to place arriving aliens in removal proceedings under INA § 240 [8 USCA § 1229a] (2006) rather than in expedited removal proceedings and (2) the fact that an immigration judge (IJ) has no jurisdiction over applications for adjustment of status under the Cuban Refugee Adjustment Act of November 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161, as amended (Cuban Adjustment Act), does not negate his or her jurisdiction over the removal proceedings of arriving Cuban aliens under INA § 240, *Matter of E-R-M- & L-R-M-,* 25 I. & N. Dec. 520 (B.I.A. June 3, 2011).

The respondents, natives and citizens of Cuba, applied for admission to the U.S. as applicants for asylum at a land border crossing on or about October 29, 2008. DHS initiated removal proceedings against the respondents, charging that they are removable under INA § 212(a)(7)(A)(i)(I) [8 USCA § 1182(a)(7)(A)(i)(I)] (2006) as aliens without valid entry documents. The IJ terminated the removal proceedings on jurisdictional grounds, concluding that arriving aliens who are inadmissible must be placed in expedited removal proceedings pursuant to INA § 235(b)(1)(A)(i), which provides, in pertinent part:

> If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States … is inadmissible under section 212(a)(6)(C) or 212(a)(7), the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution.

The IJ reasoned that the only aliens exempt from expedited removal proceedings are those described in § 235(b)(1)(F), which provides that expedited removal "shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry." Since the respondents arrived at a land border crossing, the IJ determined that they did not come under this exception and accordingly terminated the § 240 removal proceedings. DHS appealed, arguing that (1) the IJ erred in holding that he lacked jurisdiction over the § 240 proceedings and (2) DHS has the discretion to place inadmissible arriving aliens directly in removal proceedings under § 240, an issue which the Board left undecided in *Matter of R-D-*, 24 I. & N. Dec. 221 (B.I.A. 2007).[96] DHS contended that the use of the word "shall" in § 235(b)(1)(A)(i) is properly interpreted to mean "may."

The respondents agreed with DHS that it had discretion to place them in removal proceedings but argued that the IJ correctly found that he lacked jurisdiction over their case because they are prima facie eligible for adjustment of status under the Cuban Adjustment Act.

In an opinion written by Board Member Roger Pauley for the panel, which included Board Members Lauri S. Filppu and Patricia A. Cole, the Board disagreed with the IJ's conclusion that "shall" as used in § 235(b)(1)(A)(i) requires that the respondents be placed into expedited

removal proceedings. The Board reasoned that, since the issue here arises in the context of a purported restraint on DHS' exercise of its prosecutorial discretion, the term "shall" does not carry its ordinary meaning, namely, that an act is mandatory. Citing *U.S. v. Armstrong*, 517 U.S. 456, 464 (1996), and *U. S. v. Batchelder*, 442 U.S. 114, 118 (1979), the Board pointed out that it is common to use "shall" to mean "may" when it relates to the executive branch of government's decisions on whether to charge an individual or what charges to bring and found no reason to suppose that the broad discretion given to the executive branch regarding charging decisions in the criminal context does not also apply to charging decisions in the immigration context.

In addition, the Board found that the statutory scheme itself supports this conclusion since INA § 235(b)(2)(A) provides that "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 240." The Board also read the exception in INA§ 235(b)(2)(B), stating that § 235(b)(2)(A) "shall not apply" to crewmen, stowaways, or aliens "to whom paragraph (1) applies," namely, arriving aliens, such as the respondents in this case, as meaning that these three classes of aliens, including those subject to expedited removal under § 235(b)(1)(A)(i), are not *entitled* to a § 240 proceeding, *not* that these classes of aliens may not be placed in such proceedings.

Turning to the respondents' argument that the IJ lacked jurisdiction over their case because they are prima facie eligible for adjustment of status under the Cuban Adjustment Act, the Board concluded that the fact that IJs lack jurisdiction to adjudicate an application filed by an arriving alien seeking adjustment of status under the Cuban Adjustment Act, with the limited exception of an alien who has been placed in removal proceedings after returning to the U.S. pursuant to a grant of advance parole to pursue a previously filed application,[97] does not negate the IJ's jurisdiction over removal proceedings under INA § 240.

Accordingly, the Board sustained DHS' appeal, vacated the IJ's ruling that he lacked jurisdiction over the respondents' removal proceedings, reinstated those proceedings, and remanded to the IJ for further proceedings and entry of a new decision. The Board noted that, since the IJ lacked jurisdiction over adjustment applications under the Cuban Adjustment Act, the respondents may elect to file such applications with U.S. Citizenship and Immigration Services.

Won Kidane, Seattle, Washington, represented the respondent. Joy A. Merriman, Assistant Chief Counsel, appeared for DHS.

Notes

[95] 88 Interpreter Releases 1376 (June 6, 2011).

[96] *Matter of R-D-* is addressed in 84 Interpreter Releases 1528 (July 9, 2007) and 84 Interpreter Releases 2461 (Oct. 22, 2007).

[97] *Matter of Martinez-Montalvo*, 24 I. & N. Dec. 778 (B.I.A. 2009), discussed in 86 Interpreter Releases 1185 (Apr. 27, 2009). ■

4. BIA Issues Two Precedent Decisions Addressing Late TPS Registration

The Board of Immigration Appeals (BIA or Board) has issued two precedent decisions addressing late initial registration for temporary protected status (TPS) filed by derivatives of aliens currently eligible for TPS, 8 CFR § 1244.2(f)(2).

8 CFR § 1244.2 provides:

> Except as provided in §§ 1244.3 and 1244.4, an alien may in the discretion of the director be granted Temporary Protected Status if the alien establishes that he or she:
>
> (a) Is a national, as defined in section 101(a)(21) of the Act [8 USCA §1101(a)(21)], of a foreign state designated under section 244(b) of the Act [8 USCA §1254a(b)];
>
> (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
>
> (c) Has continuously resided in the United States since such date as the Attorney General may designate;
>
> (d) Is admissible as an immigrant except as provided under § 1244.3;
>
> (e) Is not ineligible under § 1244.4; and
>
> (f)(1) Registers for Temporary Protected Status during the initial registration period announced by public notice in the Federal Register, or

(2) During any subsequent extension of such designation if at the time of the initial registration period:

(i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;

(ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;

(iii) The applicant is a parolee or has a pending request for reparole; or

(iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

(3) Eligibility for late initial registration in a currently designated foreign state shall also continue until January 15, 1999, for any applicant who would have been eligible to apply previously if paragraph (f)(2) of this section as revised had been in effect before November 16, 1998.

(g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section.

LATE INITIAL TPS REGISTRANT DERIVATIVE SPOUSE MUST BE FROM A STATE DESIGNATED FOR TPS

As previously reported,[98] the BIA held in *Matter of Echeverria*, 25 I. & N. Dec. 512 (B.I.A. June 1, 2011), that an alien seeking TPS as a derivative spouse must be from a foreign state designated for TPS eligibility.

The respondent, a native and citizen of Argentina, was admitted to the U.S. as a nonimmigrant visitor in 1998, remained beyond her authorized stay, and on February 2, 2002, married her spouse, who received TPS as a national of El Salvador during the initial registration period and subsequently renewed that status. The Department of Homeland Security (DHS) charged in September 2007 that the respondent is subject to removal under INA § 237(a)(1)(B) [8 USCA § 1227(a)(1)(B)] (2006) as an alien who remained in the U.S. for a time longer than permitted. On December 13, 2007, the respondent filed a TPS application (Form I-821) as the spouse of "an alien currently eligible to be a TPS registrant" pursuant to 8 CFR § 244.2(f)(2)(iv) (2007). In January 2008, DHS denied the TPS application because the respondent is not a national of any foreign state for which DHS was then processing TPS applications.

In March 2008, the respondent renewed her TPS application before the immigration judge (IJ), who denied the request in April 2008 because the respondent, who is the spouse of a national of a foreign state currently designated for TPS, is not herself such a national. The respondent filed a motion for reconsideration of the IJ's decision, which the IJ denied in a decision dated May 12, 2008, again based on her inability to independently satisfy the nationality requirement for TPS. Thereafter, the IJ ordered her removed to Argentina. The respondent appealed.

In an opinion written by Board Member Roger Pauley for the panel, which included Board Members Lauri S. Filppu and Anne J. Greer, the Board concluded that a late initial registrant for TPS under 8 CFR § 1244.2(f)(2) (2011) must independently meet all initial registration requirements of TPS, including showing that the applicant is a national (or in the case of an alien having no nationality, a habitual resident) of a foreign state currently designated for TPS by the Attorney General. As such, the Board ruled that an alien seeking TPS as a derivative spouse must be from a foreign state designated for TPS eligibility, and, as a result, the respondent, the spouse of a national of a foreign state currently designated for TPS, is not herself eligible for TPS if not a national (or habitual resident) of such a state. The Board explained that the statute, INA § 244(a)(1) [8 USCA § 1254a(a)(1)], contemplates that TPS will only be grated to nationals of, or aliens who last habitually resided in, a foreign state designated by the Attorney General and expressed its agreement with the holding of the U.S. Court of Appeals for the Third Circuit (the circuit in which the present case arose) in *De Leon-Ochoa v. Attorney General of U.S.*, 622 F.3d 341 (3d Cir. 2010), that INA § 244(a)(1) is clear and unambiguous. Moreover, the Board also found that the regulations support the conclusion that there is no authority for a grant of TPS to an alien who is not a national or habitual resident of a designated foreign state.

The Board observed that the initial regulations implementing the TPS statute did not provide for late registration; rather those provisions were added two years later in an interim rule allowing an exception to the deadlines for TPS registration for those persons who did not register for TPS because they were in a valid immigrant or nonimmigrant status on the date when their country of nationality or last habitual residence was designated for TPS and during the initial registration period.[99] The interim rule, the Board noted, expressly stated that "[p]ersons covered by this exception must meet *all other requirements of TPS* including presence in the

United States at the time the foreign state in question was designated for TPS."[100]

The Board further noted that the regulation at 8 CFR § 1244.2 sets forth the TPS initial registration eligibility requirements for TPS in six discrete subsections, indicated as (a) through (f)(1) and concluded that the use of the conjunction "and" between subsections (e) and (f) constitutes a clear indication that an initial TPS registrant must satisfy each of the six discrete eligibility requirements. Moreover, the Board stated, the Attorney General's admonitions in both the interim and final rules that applicants for late initial registration "must meet all other requirements of TPS" constitute a clear statement that the initial registration requirements are to be understood in the conjunctive, rather than the disjunctive.

By contrast, the Board found that the use of the disjunctive "or" between subsections (f)(1) and (2) indicates that the provisions of subsection (f)(2) are not included in the eligibility requirements for initial TPS registrants in subsection (f)(1). Rather, the Board stated, subsection (f)(2), which is comprised of subparagraphs (i) through (iv), sets forth four separate and distinct conditions precedent for late initial registration for TPS, but does not provide any independent, alternative means for establishing eligibility for TPS. The Board found that this is the only interpretation that squares with the Attorney General's admonition that applicants for late initial registration "must meet all other requirements of TPS."

Since the respondent is not a national of a foreign state designated for TPS status, the Board concluded that she is not able to satisfy the initial registration requirements for TPS and is foreclosed from establishing eligibility as a late registrant under 8 CFR § 1244.2(a). The Board rejected the respondent's reliance upon a contrary unpublished (nonprecedent) Board decision. Accordingly, the appeal was dismissed.

Elissa C. Steglich, Newark, New Jersey, represented the respondent. Joseph Silver, Assistant Chief Counsel, represented for DHS.

Late Initial TPS Registrant Derivative Child Must Qualify as "Child" at Time of Initial Registration Period, Not Time of Application

The BIA held in *Matter of N-C-M-,* 25 I. & N. Dec. 535 (B.I.A. June 10, 2011), that to be eligible for late initial registration for TPS, an applicant filing as the "child of an alien currently eligible to be a TPS registrant" must establish only that he or she qualified as a "child" at the time of the initial registration period, not at the time when the application was filed.

The respondent, a native and citizen of El Salvador, appealed from an IJ's denial of his applications for asylum under INA § 208 [8 USCA § 1158] (2006), withholding of removal under INA § 241(b)(3) [8 USCA § 1231(b)(3)] (2006), and protection under the Convention Against Torture (CAT).[101] The respondent also appealed the IJ's determination that he is ineligible for TPS, for which he submitted a late registration that was denied by DHS in March 2007.

The Board, in an opinion written by Board Member Roger Pauley for the panel, which included Board Members Lauri S. Filppu and Linda S. Wendtland, dismissed the appeal of the denial of the asylum, withholding, and CAT applications in a footnote to the opinion, expressing its agreement with the IJ that the respondent failed to submit adequate evidence that he was a member of a particular social group and failed to submit adequate evidence to show a clear probability of torture at the instigation of, or with the consent or acquiescence of, current government officials or persons acting in an official capacity.

Turning to the TPS claim, the Board noted that U.S. Citizenship and Immigration Services (USCIS) denied this relief upon finding that the respondent failed to prove his residence in the U.S. prior to February 13, 2001, and his continuous physical presence since March 9, 2001; however, the IJ based her decision on the fact that the respondent was 24 years old when he filed for TPS benefits in 2006. The IJ reasoned that, under 8 CFR § 1244.2(g), which provides that a person must file his or her application for TPS benefits within 60 days of the "expiration or termination of conditions described in paragraph (f)(2) of this section," the respondent was bound to file his late TPS registration within 60 days of his 21st birthday, which was on July 15, 2003. The Board rejected the respondent's contention that the IJ erred in considering the issue of whether the respondent was properly considered a child for these purposes, but agreed that the IJ erred in her interpretation of the regulations.

The Board explained that the regulations require an alien to establish that at the time of the initial registration period, he or she either had a familial relationship with another TPS-eligible alien, 8 CFR § 1244.2(f)(2)(iv), or was in a specified immigration status or had a pending application or request for a certain status or relief, 8 CFR §§ 1244.2(f)(2)(i) to (iii). The relationship or specified "status" must exist "at the time of the initial registration period," 8 CFR § 1244.2(f)(2). 8 CFR § 1244.2(g) deals with the "expiration or termination" of "conditions" described in paragraph(f)(2) and essentially extends the deadline for late registration to allow applicants who no longer fall into the categories listed in paragraph (f)(2) to file within 60 days of the "expiration" or "termination" of their classification. The Board found that the IJ

erred in interpreting paragraph (g) as covering both the immigration status categories listed in 8 CFR § 1244.2(f)(2)(i) to (iii) and the familial relationships listed in paragraph (f)(2)(iv), finding instead that paragraph (g) applies only to the immigration status categories. The Board based this conclusion on the regulatory language chosen by the Attorney General, the regulatory history, and the guidance provided by USCIS to aliens seeking late initial registration for TPS benefits.

The Board noted that the regulation, as originally proposed, did not contain the familial relationships listed in paragraph (f)(2)(iv); rather, this provision was added as a result of comments received on the interim rule. The Board found that, "[w]hile the 'termination' or 'expiration' provisions of paragraph (g) have clear applicability to the expiration of a defined period of visa applicability, voluntary departure, parole, or status, the regulations give no indication that the Attorney General intended that those provisions would apply to the late application of a person who was a qualifying child of a TPS-eligible alien at the time of the initial registration period." Rather, the Board said, the regulation does not reflect any consideration by the Attorney General to define a window during which an otherwise eligible child of a TPS-eligible alien must file his or her application, but instead, in response to comments, recognized that the INS "agree[d] … that … minors whose parents registered for TPS but did not register any or all of their children, should be eligible for … late initial registration." Accordingly, the Board concluded that the regulations require that a late registrant be a "child" only "at the time of the initial registration period," not at the time when the application for late initial registration is filed. The Board found support for this conclusion in USCIS' fact sheet regarding late initial registration,[102] which states that, "[t]o qualify for a late initial TPS registration application, you must … demonstrate that at the time of the initial registration period of the TPS designation … you … were the spouse or child of an alien currently eligible to be a TPS registrant."

The Board therefore sustained the respondent's appeal from the IJ's determination that he is ineligible for TPS benefits and remanded the matter to the IJ for further consideration of the TPS application.

Frank P. Sprouls, San Francisco, California, represented the respondent. Scott A. Eash, Assistant Chief Counsel, appeared for DHS.

Notes

[98] See 88 Interpreter Releases 1376 (June 6, 2011).

[99] See 58 Fed. Reg. 58935 (Nov. 5, 1993).

[100] Id. at 58936 (emphasis added).

[101] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the U.S. Apr. 18, 1988)

[102] See USCIS, DHS, Guidance on Late Initial Registration for TPS Applicants, available at http://www.uscis.gov (last updated May 10, 2010). ■

5. Alabama Governor Robert Bentley Signs Tough Immigration Bill into Law

On June 9, 2011, Alabama Governor Robert Bentley signed into law the Beason-Hammon Alabama Taxpayer and Citizen Protection Act (H.R. 56), widely regarded as the toughest immigration law in the nation. The majority of its provisions go into effect on September 1, 2011.

Section 2 provides:

> The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness in this state and that illegal immigration is encouraged when public agencies within this state provide public benefits without verifying immigration status. Because the costs incurred by school districts for the public elementary and secondary education of children who are aliens not lawfully present in the United States can adversely affect the availability of public education resources to students who are United States citizens or are aliens lawfully present in the United States, the State of Alabama determines that there is a compelling need for the State Board of Education to accurately measure and assess the population of students who are aliens not lawfully present in the United States, in order to forecast and plan for any impact that the presence such population may have on publicly funded education in this state. The State of Alabama further finds that certain practices currently allowed in this state impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Alabama. Therefore, the people of the State of Alabama declare that it is a compelling public interest to discourage illegal immigration by requiring all agencies within this state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws. The State of Alabama also finds that other measures are necessary to ensure the integrity of various governmental programs and services.

Section 3 provides in part:

(10) LAWFUL PRESENCE OR LAWFULLY PRESENT. A person shall be regarded as an alien unlawfully present in the United States only if the person's unlawful immigration status has been verified by the federal government pursuant to 8 U.S.C. § 1373(c). No officer of this state or any political subdivision of this state shall attempt to independently make a final determination of an alien's immigration status. An alien possessing self-identification in any of the following forms is entitled to the presumption that he or she is an alien lawfully present in the United States:

a. A valid, unexpired Alabama driver's license.

b. A valid, unexpired Alabama nondriver identification card.

c. A valid tribal enrollment card or other form of tribal identification bearing a photograph or other biometric identifier.

d. Any valid United States federal or state government issued identification document bearing a photograph or other biometric identifier, if issued by an entity that requires proof of lawful presence in the United States before issuance.

e. A foreign passport with an unexpired United States Visa and a corresponding stamp or notation by the United States Department of Homeland Security indicating the bearer's admission to the United States.

f. A foreign passport issued by a visa waiver country with the corresponding entry stamp and unexpired duration of stay annotation or an I-94W form by the United States Department of Homeland Security indicating the bearer's admission to the United States.[103]

…

(16) UNAUTHORIZED ALIEN. An alien who is not authorized to work in the United States as defined in 8 U.S.C. § 1324a(h)(3).

The remainder of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act provides in part as follows:

287(g) AGREEMENT

The Alabama Attorney General must attempt to negotiate the terms of a 287(g) memorandum of agreement between the State of Alabama and the U.S. Department of Homeland Security (DHS).[104]

FULL SUPPORT OF ENFORCEMENT OF FEDERAL AND ALABAMA IMMIGRATION LAWS

All state officials, agencies, and personnel, including, but not limited to, an officer of an Alabama state court, must (1) fully comply with and, to the full extent permitted by law, support the enforcement of federal law prohibiting the entry into, presence, or residence in the U.S. of aliens in violation of federal immigration law and (2) fully comply with the Beason-Hammon Alabama Taxpayer and Citizen Protection Act and, to the full extent permitted by law, support the enforcement of the Act.

PUBLIC BENEFITS

An alien who is not lawfully present in the U.S. and who is not defined as an alien eligible for public benefits under 8 USCA § 1621(a) or 8 USCA § 1641 may not receive any state or local public benefits. Commencing on the effective date of the Alabama act,[105] each agency or political subdivision of the state must verify with the federal government the lawful presence in the U.S. of each alien who applies for state or local public benefits pursuant to 8 USCA §§ 1373(c), 1621, and 1625. The verification must be made through the Systematic Alien Verification for Entitlements (SAVE) program operated by DHS. However, verification of lawful presence in the U.S. is not required for, among other things (1) primary or secondary school education and state or local public benefits that are listed in 8 USCA § 1621(b), (2) obtaining health-care items and services that are necessary for the treatment of an emergency medical condition of the person involved and are not related to an organ transplant procedure, (3) public health assistance for immunizations with respect to immunizable diseases, the Special Supplemental Nutrition Program for Women, Infants, and Children, and testing and treatment of symptoms of communicable diseases, (4) prenatal care, and (5) child protective services and adult protective services and domestic violence services workers.

POSTSECONDARY EDUCATION AND RELATED BENEFITS

An alien who is not lawfully present in the U.S. may not be permitted to enroll in or attend any public postsecondary education institution in Alabama. Furthermore, except as otherwise provided by law, an alien who is not lawfully present in the U.S. is not eligible for any postsecondary education benefit, including, but not limited to, scholarships, grants, or financial aid.

Prerequisites for Award of Government Contract, Grant, or Incentive to Business Entity or Employer

Effective January 1, 2012, as a condition for the award of any contract, grant, or incentive by the state, any political subdivision thereof, or any state-funded entity to a business entity or employer that employs one or more employees, the business entity or employer may not knowingly employ, hire for employment, or continue to employ an unauthorized alien and must attest to such by sworn affidavit signed before a notary. Upon the first violation of this provision, the business entity or employer must be deemed in breach of contract and the state, political subdivision thereof, or state-funded entity may terminate the contract after providing notice and an opportunity to be heard. Upon application by the state entity, political subdivision thereof, or state-funded entity, the Alabama Attorney General may bring an action to suspend the business licenses and permits of the business entity or employer for a period not to exceed 60 days. Upon a second or subsequent violation, the business entity or employer must be deemed in breach of contract, and the state, any political subdivision thereof, or any state-funded entity must terminate the contract after providing notice and an opportunity to be heard. Upon application by the state entity, political subdivision thereof, or state-funded entity, the Alabama Attorney General may bring an action to permanently revoke the business licenses and permits of the business entity or employer.

As a condition for the award of any contract, grant, or incentive by the state, any political subdivision thereof, or any state-funded entity to a business entity or employer that employs one or more employees, the business entity or employer must provide documentation establishing that it is enrolled in the E-Verify Program.[106] A business entity or employer that complies with this requirement may not be found to be in violation of the provision prohibiting the knowing employment of an unauthorized alien.

Obligation to Complete and Carry Alien Registration Document

In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 USCA § 1304(e) or 8 USCA § 1306(a) and is an alien unlawfully present in the U.S. An alien who violates this provision is guilty of a Class C misdemeanor and subject to a fine of not more than $100 and not more than 30 days in jail.

Unauthorized Aliens May Not Apply for or Perform Work

It is unlawful for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in Alabama.

Day Laborers and Their Employers

It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway, or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic. In addition, it is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway, or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic. A person who is in violation of this section is guilty of a Class C misdemeanor and subject to a fine of not more than $500.

Determination of Citizenship and Immigration Status Following Stop, Detention, or Arrest by Law-Enforcement Officer

Upon any lawful stop, detention, or arrest made by a state, county, or municipal law-enforcement officer of Alabama in the enforcement of any state law or ordinance of any political subdivision thereof, where reasonable suspicion exists that the person is an alien who is unlawfully present in the U.S., a reasonable attempt must be made, when practicable, to determine the citizenship and immigration status of the person unless the determination may hinder or obstruct an investigation.

Determination of Citizenship and Immigration Status of Alien Who Is Arrested and Booked into Custody

Any alien who is arrested and booked into custody must have his or her immigration status verified by contacting the federal government pursuant to 8 USCA § 1373(c) within 24 hours of the time of the alien's arrest. If for any reason federal verification is delayed beyond the time that the alien would otherwise be released from custody, the alien must be released from custody. If an alien is determined by the federal government to be an alien who is unlawfully present in U.S., the law-enforcement agency must cooperate in the transfer of the alien to the custody of the federal government if the federal government so requests.

Concealing, Harboring, or Shielding, Transporting, or Renting to Aliens

It is unlawful for a person to do any of the following: (1) conceal, harbor, or shield, or attempt to conceal, harbor, or shield, or conspire to conceal, harbor, or shield an alien from detection in any place in Alabama, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, entered, or remains in the U.S. in violation of federal law, (2) encourage or induce such an alien to come to or reside in Alabama, (3) transport, or attempt to transport, or conspire to transport in Alabama an alien in furtherance of the unlawful presence of the alien in the U.S., (4) conspire to be so transported, or (5) harbor such an alien by entering into a rental agreement with the alien to provide accommodations. Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of this section, as well as the gross proceeds of such a violation, are subject to civil forfeiture.

Dealing in False Identification Documents and Vital Records Identity Fraud

A person commits the crime of dealing in false identification documents if he or she knowingly reproduces, manufactures, sells, or offers for sale any identification document that (1) simulates, purports to be, or is designed so as to cause others reasonably to believe it to be an identification document and (2) bears a fictitious name or other false information. A person commits the crime of vital records identity fraud related to birth, death, marriage, and divorce certificates if he or she (1) supplies false information intending that the information be used to obtain a certified copy of a vital record, (2) makes, counterfeits, alters, amends, or mutilates any certified copy of a vital record without lawful authority and with the intent to deceive, or (3) obtains, possesses, uses, sells, or furnishes or attempts to obtain, possess, or furnish to another a certified copy of a vital record with the intent to deceive.

Dealing in false identification documents and vital records identity fraud are both Class C felonies. Any person convicted of dealing in false identification documents must be fined up to $1,000 for every card or document that he or she creates or possesses.

E-Verify; Penalties for Employing Unauthorized Alien

Effective April 1, 2012, every business entity or employer in Alabama must enroll in E-Verify. On or after January 1, 2012, before receiving any contract, grant, or incentive from the state, any political subdivision thereof, or any state-funded entity, a business entity or employer must provide proof to the state, political subdivision thereof, or state-funded entity that the business entity or employer is enrolled and is participating in the E-Verify Program either independently or through the Alabama Department of Homeland Security E-Verify employer agent service, which is available at no cost to any business entity or employer in Alabama with 25 or fewer employees.

No business entity, employer, or public employer may knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work in Alabama within the meaning of 8 USCA § 1324a. On a finding of a first violation by a court of competent jurisdiction that a business entity or employer knowingly violated this provision, the court must (1) order the business entity or employer to terminate the employment of every unauthorized alien, (2) subject the business entity or employer to a three-year probationary period throughout the state, and (3) direct the applicable state, county, or municipal governing bodies to suspend the business licenses and permits, if such exist, of the business entity or employer for a period not to exceed 10 business days specific to the business location where the unauthorized alien performed work. For a second violation, the court must direct the applicable state, county, or municipal governing body to permanently revoke all business licenses and permits, if such exist, held by the business entity or employer specific to the business location where the unauthorized alien performed work. On receipt of the order, the appropriate agencies must immediately revoke the licenses and permits held by the business entity or employer. For a subsequent violation, the court must direct the applicable governing bodies to forever suspend the business licenses and permits, if such exist, of the business entity or employer throughout the state.

This provision may not be construed to deny any procedural mechanisms or legal defenses included in the E-Verify Program or any other federal work-authorization program. A person or entity that establishes that it has complied in good faith with the requirements of 8 USCA § 1324a(b) establishes an affirmative defense that the business entity or employer did not knowingly hire or employ an unauthorized alien.

Any resident of Alabama may petition the state Attorney General to bring an enforcement action against a specific business entity or employer by means of a written, signed petition that includes an allegation that describes the alleged violator or violators, as well as the action constituting the violation, and the date and location where the action occurred.

Discrimination Against U.S. Citizens and Authorized Aliens

It is a discriminatory practice for a business entity or employer to fail to hire a job applicant who is a U.S. citizen or an alien who is authorized to work in the U.S. as defined in 8 USCA § 1324a(h)(3) or discharge an employee working in Alabama who is a U.S. citizen or an alien who is authorized to work in the U.S. while retaining or hiring an employee who the business entity or employer knows, or reasonably should have known, is an unauthorized alien. A violation of this provision may be the basis of a civil action in the Alabama state courts. Any recovery is limited to compensatory relief and may not include any civil or criminal sanctions against the employer.

Driving Without a License; Detention of Aliens Unlawfully Present in U.S.

Alabama law requires that every licensee must have his or her license in his or her immediate possession at all times when driving a motor vehicle. If a law officer arrests a person for a violation of this provision and the officer is unable to determine by any other means that the person has a valid driver's license, the officer must transport the person to the nearest or most accessible magistrate. A reasonable effort must be made to determine the citizenship of the person and, if an alien, whether the alien is lawfully present in the U.S. by verification with the federal government pursuant to 8 USCA § 1373(c). The verification inquiry must be made within 48 hours to the Law Enforcement Support Center of DHS or other office or agency designated for that purpose by the federal government. If the person is determined to be an alien unlawfully present in the U.S., the person is considered a flight risk and must be detained until prosecution or until handed over to federal immigration authorities.

Verification of Status of Persons Charged with or Convicted of a Crime or Confined in Jail; Detention and Notification of ICE

When a person is charged with a crime for which bail is required or is confined for any period in a state, county, or municipal jail, a reasonable effort must be made to determine if the person is an alien unlawfully present in the U.S. by verification with the federal government pursuant to 8 USCA § 1373(c). The verification inquiry must be made within 48 hours. If the person is determined to be an alien unlawfully present in the U.S., the person is considered a flight risk and must be detained until prosecution or until handed over to federal immigration authorities.

If an alien who is unlawfully present in the U.S. is convicted of a violation of state or local law and is within 30 days of release or has paid any fine as required by operation of law, the agency responsible for his or her incarceration must notify U.S. Immigration and Customs Enforcement (ICE) and the Alabama Department of Homeland Security pursuant to 8 USCA § 1373.

Enforcement of Contracts

No Alabama state court may enforce the terms of, or otherwise regard as valid, any contract between a party and an alien unlawfully present in the U.S. if the party had direct or constructive knowledge that the alien was unlawfully present at the time when the contract was entered into and the performance of the contract required the alien to remain unlawfully present in the U.S. for more than 24 hours after the time when the contract was entered into or performance could not reasonably be expected to occur without the alien remaining in the U.S. for more than 24 hours after the time the contract was entered into. However, this provision does not apply to a contract for lodging for one night, a contract for the purchase of food to be consumed by the alien, a contract for medical services, or a contract for transportation of the alien that is intended to facilitate the alien's return to his or her country of origin.

Determinations Required to Be Made by Public Elementary and Secondary Schools Upon Enrollment of Students

Every public elementary and secondary school in Alabama, at the time of enrollment in kindergarten or any grade in such school, must determine whether the student enrolling in public school was born outside of the jurisdiction of the U.S. or is the child of an alien not lawfully present in the U.S. and qualifies for assignment to an English as second language (ESL) class or other remedial program. In making that determination, the public school must rely upon presentation of the student's original birth certificate or a certified copy thereof. If, upon review of the student's birth certificate, it is determined that the student was born outside of the U.S. or is the child of an alien not lawfully present in the U.S., or where such certificate is not available for any reason, the parent, guardian, or legal custodian of the student must notify the school within 30 days of the date of the student's enrollment of the actual citizenship or immigration status of the student under federal law. Notification consists of (1) the presentation, for inspection to a school official designated for such purpose by the school district in which the child is enrolled, of official documentation establishing the citizenship and, in the case of an alien, the immigration status of the student or alternatively by

submission of a notarized copy of such documentation to such official and (2) attestation by the parent, guardian, or legal custodian under penalty of perjury that the document states the true identity of the child. If the student or his or her parent, guardian, or legal representative possesses no such documentation but nevertheless maintains that the student is either a U.S. citizen or an alien lawfully present in the U.S., the parent, guardian, or legal representative of the student may sign a declaration so stating under penalty of perjury. If no such documentation or declaration is presented, the school official must presume that the student is an alien unlawfully present in the U.S.

Reports by School Districts to State Board of education

Each school district in Alabama must collect and compile certain data and submit an annual report to the State Board of Education. In turn, the State Board of Education must compile and submit an annual public report to the state legislature which provides (1) data, aggregated by public school, regarding the numbers of U.S. citizens, of lawfully present aliens by immigration classification, and of aliens believed to be unlawfully present in the U.S. enrolled at all primary and secondary public schools in Alabama and (2) the number of students in each category participating in ESL programs enrolled at such schools. The report must analyze and identify the effects upon the standard or quality of education provided to students who are U.S. citizens residing in Alabama that may have occurred, or are expected to occur in the future, as a consequence of the enrollment of students who are aliens not lawfully present in the U.S. It must also analyze and itemize the fiscal costs to the state and political subdivisions thereof of providing educational instruction, computers, textbooks, and other supplies, free or discounted school meals, and extracurricular activities to students who are aliens not lawfully present in the U.S.

Voter Registration

Alabama's Secretary of State must create a process for a county election officer to determine whether an applicant for voter registration has provided with the application the information necessary to assess the eligibility of the applicant, including his or her U.S. citizenship. An applicant may not be registered until he or she has provided satisfactory evidence of U.S. citizenship, which must be provided in person at the time of filing the application for registration or by including, with a mailed registration application, a photocopy of one of the documents listed in the law as evidence of U.S. citizenship.

Business Transactions

An alien not lawfully present in the U.S. may not enter into or attempt to enter into a business transaction with the state or a political subdivision of the state, and no person may enter into a business transaction or attempt to enter into a business transaction on behalf of an alien not lawfully present in the U.S. "Business transaction" includes any transaction between a person and the state or a political subdivision of the state, including, but not limited to, applying for or renewing a motor vehicle license plate, applying for or renewing a driver's license or nondriver identification card, or applying for or renewing a business license, but does not include applying for a marriage license. Any person entering into a business transaction or attempting to enter into a business transaction with the state or a political subdivision of the state is required to demonstrate his or her U.S. citizenship or, if he or she is an alien, his or her lawful presence in the U.S. to the person conducting the business transaction on behalf of the state or a political subdivision of the state.

REAL ID

Finally, nothing in the Beason-Hammon Alabama Taxpayer and Citizen Protection Act is in any way meant to implement, authorize, or establish the REAL ID Act of 2005.[107]

Notes

[103] The visa waiver program permits eligible nationals of designated countries to travel to the U.S. for tourism or business for stays of 90 days or less without obtaining a visa.

[104] INA § 287(g) [8 USCA § 1357(g)] permits designated officers of state and local law-enforcement agencies to perform immigration law-enforcement functions pursuant to a memorandum of understanding (MOU) with U.S. Immigration and Customs Enforcement (ICE) provided that they receive appropriate training and function under the supervision of ICE officers.

[105] Generally, September 1, 2011.

[106] E-Verify is a free, Internet-based employment verification system operated by U.S. Citizenship and Immigration Services in partnership with the Social Security Administration that allows participating employers to electronically verify the employment eligibility of their newly hired employees.

[107] Pub. L. No. 109-13, 119 Stat. 231, 310-11 (May 11, 2005). The REAL ID Act includes provisions that require state driver's licenses to include full name, date of birth, gender, driver's license number, digital photo, principal residence address, and signature and to be tamper-proof and machine-readable. See 82 Interpreter Releases 813 (May 16, 2005) for an in-depth discussion of the REAL ID Act. ■

6. USCIS Issues Final Memorandum on Expediting I-601s Filed Overseas

On January 13, 2011, U.S. Citizenship and Immigration Services (USCIS) posted a draft policy memorandum (PM) to its Web page[108] entitled "Requests to Expedite Adjudication of Form I-601, Application for Waiver of Grounds of Inadmissibility, filed by individuals outside the United States; Adjudicator's Field Manual (AFM) Update AD 11-10," adding a new Chapter 41.7 to the AFM providing guidelines for processing requests to expedite the adjudication of Forms I-601 filed by individuals outside the U.S.—both those filed at overseas field offices and those filed from Canada and adjudicated at the Vermont Service Center.[109] USCIS has now issued the final version of this PM. It is reproduced in Appendix II of this Release.

A number of changes were made in finalizing the PM, most notably, Appendix 41.5, Template for Notice of receipt of Requests to Expedite I-601 Processing for Applicants Outside the U.S., referred to in both the draft and final PM, is attached to the final PM. Some minor wording changes were made to clarify text. A footnote was added at the end of the first sentence in the paragraph under "Policy." It reads as follows:

> When a Form I-212 application is submitted in conjunction with a Form I-601application, a request or decision to expedite the adjudication of the Form I-601 application will be treated as a request or decision to expedite the accompanying Form I-212 application.

In addition, the following was added to the end of the paragraph under "Policy":

> There may also be other time-sensitive circumstances that merit expeditious processing for other reasons, principally where the failure to expedite the adjudication could result in significant delays in family reunification. For example, the applicant may be ineligible to receive a visa in the following month due to forecasted visa regression, and therefore faces an even more prolonged and unanticipated separation from family members if the application is not expedited. Similarly, the applicant may request that the case be expedited to prevent a child not covered by the Child Status Protection Act aging out before visa issuance. There also may be circumstances in which a prior USCIS error merits expeditious processing of a request.

Under "Implementation," "The Adjudicator's Field Manual is revised as follows:" was replaced with "The *AFM* and the International Operations Division Field Guidance for Form I-601 adjudications are revised as follows:"

The following has been added to the end of AFM Chapter 41.7(b)(1) Applicability:

> This guidance shall also apply to any Form I-212 application submitted in conjunction with a Form I-601 application for which there has been a request or decision to expedite processing.

In AFM Chapter 41.7(b)(2) Criteria, "to deny" has been removed from the statement that USCIS may exercise discretion to approve or deny a request to expedite adjudication, "the type of extraordinary situations that may, generally, merit expedited processing" has been changed to "the type of extraordinary circumstances that may, generally, merit expedited processing," and the following has been added:

> or other time-sensitive circumstances that nonetheless merit expeditious processing, principally where the failure to expedite the adjudication could result in significant delays in family reunification

In addition, in the bulleted list of "situations," the following changes have been made:

(1) In the second bulleted item, "life-threatening medical condition" has been changed to "serious medical condition"; "immediate needs" has been changed to "urgent and critical medical needs"; and "for the applicant to assist" has been changed to "that require the applicant to assist."

(2) In the third bulleted item, "terminal illness" has been changed to "serious illness."

(3) The fourth bulleted item has been changed to read: "The applicant or qualifying family member is a particularly vulnerable individual due to age, serious medical condition, or disability and this vulnerability is exacerbated by the applicant's presence outside the United States."

Finally, the following has been added at the end of the bulleted list:

> The above non-exhaustive list describes some examples of situations that may, depending on the facts of the case, merit a discretionary approval of a request to expedite adjudication of a waiver request. However, these are not the only circumstances that may warrant expeditious processing. There may also be other time-sensitive circumstances that do not necessitate the applicant's presence in the United States sooner than would be possible under normal processing times, but that nonetheless merit

> expeditious processing. For example, the applicant may be ineligible to receive a visa in the following month due to forecasted visa regression and therefore faces an even more prolonged and unanticipated separation from family members if the application is not expedited. Similarly, the applicant may request that the case be expedited to prevent a child not covered by the Child Status Protection Act from aging out before visa issuance. There also may be circumstances in which a prior USCIS error merits expeditious processing of a request.

In AFM Chapter 41.7(b)(3) Documentation, "life-threatening medical condition" has been changed to "serious medical condition."

In AFM Chapter 41.7(b)(4) Public Information, Notices and Outreach, the following sentence has been added:

> In particularly urgent cases, staff will make every effort to notify the applicant of an approval to expedite a request as soon as the decision to expedite has been made.

In addition, the Note at the end of Chapter 41.7(b)(4) has been changed to read as follows:

> **Note**: The Vermont Service Center (VSC) receives all Forms I-601 and I-212 filed by Canadian residents with the U.S. Embassy or Consulate in Canada. The Department of State forwards the Forms I-601 and I-212 to the VSC for adjudication. This guidance does not change existing filing instructions and the VSC will continue to send out appropriate CLAIMS3-generated notices for that workload.

Notes

[108] http://link.reuters.com/gyd63k.

[109] See 88 Interpreter Releases 205 (Jan. 17, 2011). ■

7. Federal Agencies Announce National Initiative to Combat the Unauthorized Practice of Immigration Law

On June 9, 2011, the U.S. government unveiled a national initiative to combat immigration services scams. The Departments of Justice (DOJ) and Homeland Security (DHS) and the Federal Trade Commission (FTC) are leading the Unauthorized Practice of Immigration Law (UPIL) Initiative, which targets situations where legal advice and/or representation regarding immigration matters is provided by an individual who is not an attorney or accredited representative. According to the DOJ, "This initiative is set upon three pillars—enforcement, education and continued collaboration—designed to stop UPIL scams and prosecute those who are responsible; educate immigrants about these scams and how to avoid them; and inform immigrants about the legal immigration process and where to find legitimate legal advice and representation."

The DOJ, through United States Attorneys' Offices and the Civil Division's Office of Consumer Protection Litigation, is investigating and prosecuting dozens of cases against so-called "notarios." In addition, many actions have been filed at the state and local level against individuals and businesses engaged in immigration services scams. U.S. Immigration and Customs Enforcement (ICE) has long been pursuing immigration services fraud cases, in part through its Document and Benefit Fraud Task Force offices across the country.

The FTC has made it easier for consumers to alert law enforcement about immigration scams by creating a new immigration services code in the Consumer Sentinel Network (Sentinel), its online consumer complaint database.[110] Shared with more than 2,000 law-enforcement entities, including the DOJ, ICE, and now U.S. Citizenship and Immigration Services (USCIS), Sentinel has become the primary repository for complaints involving allegations of immigration services scams. Sentinel will serve as an investigative tool for USCIS Fraud Detection and National Security officers and will bolster communication between organizations on immigration services scam-related cases.

USCIS' efforts are primarily aimed at providing immigrants with the information that they need to make informed choices when seeking legal advice and representation on immigration matters. USCIS has created a Web page about the UPIL Initiative called "The Wrong Help Can Hurt"; see http://1.usa.gov/iZiStr.

As part of the UPIL Initiative's emphasis on providing qualified legal assistance to this vulnerable population, the EOIR, the DOJ, USCIS, and the FTC are working together to increase the number of EOIR-recognized organizations and accredited representatives, particularly in underserved areas. (Organizations and representatives seeking to provide lawful immigration services must be recognized by the EOIR.) The EOIR is improving its Recognition and Accreditation Program[111] by providing easier application processing and giving timely, accurate information to the public regarding which organizations have representatives available to represent individuals in proceedings.

The DOJ's Civil Division and Access to Justice Initiative are involved in an effort to train more attorneys

to handle the cases of immigration fraud victims. This summer, nongovernmental organizations (NGOs), working with local partners, will organize a pro bono legal clinic in Baltimore, Maryland, and a legal training program will be launched in New York City, New York, to expand the pool of lawyers who can assist in immigration matters.

Notes

[110] See http://www.ftc.gov/sentinel/.

[111] See http://www.justice.gov/eoir/statspub/raroster.htm. ■

8. USCIS Issues Interim PM on USCIS District Directors' Role in BIA Accreditation Process; Seeks Comments

On June 9, 2011, U.S. Citizenship and Immigration Services (USCIS) released to the public an interim policy memorandum (IPM) dated January 7, 2011, numbered PM 602-0039, and entitled "The Role of USCIS District Directors in the Board of Immigration Appeals Recognition and Accreditation Process; Revisions to the Adjudicator's Field Manual, New Chapter 12.6, AFM Update AD 11-34." This IPM, which is effective until further notice, provides guidance clarifying the role and responsibilities of USCIS district directors related to the recognition and accreditation process administered by the Board of Immigration Appeals (BIA). The IPM reviews the applicable regulations and states that USCIS district directors are responsible for filing with the BIA a recommendation for approval or disapproval of Forms EOIR-31, Requests for Recognition of a Non-Profit Religious, Charitable, Social Service, or Similar Organization, or applications for accreditation of representative(s). The recommendation is to be based on the application, relevant information within the knowledge of the district staff about the organization applying for recognition and the individual seeking accredited representative status, and any investigation conducted by the Fraud Detection and National Security (FDNS) or the appropriate USCIS staff in connection with the application. An investigation may include a systems check, site visit, or interview, as appropriate.

The IPM also states that the BIA will evaluate whether fees charged by the organization satisfy the definition of nominal fees, but USCIS should include an assessment of this issue (and all other relevant issues) in its recommendations. In addition, the IPM states that there is no uniform standard for determining whether an applicant meets the "good moral character" requirement and that district directors may make this determination on a case-by-case basis.

The IPM proposes revising the AFM to include a new Chapter 12.6 entitled "Role of USCIS District Directors in the Board of Immigration Appeals Recognition and Accreditation Process." The IPM, including proposed AFM Chapter 12.6, is reproduced in Appendix III of this Release.

Comments on this IPM may be submitted until June 22, 2011, and should be emailed to opefeedback@uscis.dhs.gov. The title of the memorandum should be in the subject line of the email. Comments should refer to a specific portion of the memorandum, explain the reason for any recommended change, and include data, information, or authority that supports the recommendation. USCIS may distribute any comments received (including any personal information and contact information) on its public website or to those who request copies. ■

9. DOS, DHS Suspend Certain Employment and Course Regulations for Selected Libyan Students

The Department of Homeland Security (DHS) and the Department of State (DOS) have recently issued notices that, due to ongoing civil unrest in Libya, certain requirements of some Libyan students in the U.S. are being suspended. Specifically, F-1 and J-1 college and university students from Libya will be permitted to pursue and/or increase the number of hours of full-time or part-time employment in order to cover the loss or decrease of financial support from Libya. In addition, course load may be reduced.

F-1 Students

DHS announced that effective June 10, 2011, it will permit students from Libya whose financial assistance has been impacted by the turmoil in their home country to obtain employment authorization, work an increased number of hours while school is in session, and reduce their course load while continuing to maintain their F-1 student status. Students granted employment authorization under this suspension of the regulations will be consider to meet the "full course of study" requirements if they remain registered for a minimum of six semester/quarter hours of instruction per academic term if they are undergraduate students or remain registered for a minimum of three semester/quarter hours of instruction per academic term if they are graduate students.

In order to be eligible, students must have been lawfully present in the U.S. in F-1 nonimmigrant status on February 1, 2011, under INA § 101(a)(15)(F)(i) [8 USCA § 1101(a)(15)(F)(i)], and they must be enrolled in an institution that is Student and Exchange Visitor

Program (SEVP) certified for enrollment for F-1 students and currently maintaining F-1 status while experiencing severe economic hardship as a direct result of the civil unrest in Libya since February 2011.

The provisions suspended for eligible Libyan students are found in 8 CFR § 214.2(f)(6)(i)(A) and (B) (requirements relating to the minimum course load) and 8 CFR § 214.2(f)(9) (employment eligibility requirements).

In order to benefit from these changes, students must work with their designated school officer (DSO) to have their student record in SEVIS annotated to include:

> Approved for more than 20 hours per week of [DSO must insert "on-campus" or "off-campus," depending upon the type of employment authorization the student already has] employment authorization and reduced course load under the Special Student Relief authorization from [DSO must insert the beginning date of employment] until [DSO must insert the student's program end date, December 31, 2011, or the current EAD[112] expiration date (if the student is currently working off campus), whichever date comes first].

The notice also indicates that spouse and/or minor children of eligible F-1 students are not authorized to obtain employment. Further, students granted F-1 status after February 1, 2011, are also not eligible for benefits under the regulation suspensions. Elementary school, middle school, and high school students in F-1 status are also ineligible to benefit from the changes.

The changes made by DHS will automatically end on December 31, 2011. The notice is published in 76 Fed. Reg. 33970 (June 10, 2011) and is reproduced in Appendix IV of this Release.

J-1 Students

The DOS has temporarily suspended the application of the full-course-of-study requirement set forth at 22 CFR § 62.23(e), the application of the requirements governing student employment set forth at 22 CFR § 62.23(g), and the application of the duration-of-participation requirements set forth at 22 CFR § 62.23(h) for certain eligible students from Libya. The changes apply to college and university students. Reduction in course load is permissible and students will be deemed to be in valid J-1 Exchange Visitor Program student status if they are (i) an undergraduate student and enrolled for not less than six semester hours of academic credit or its recognized equivalent, (ii) a graduate student enrolled for not less than three hours of academic credit or its recognized equivalent, (iii) a non-degree student actively participating on not less than a half-time equivalent basis in the prescribed course of study for which the student was initially authorized J-1 student status, or (iv) a non-degree student actively pursuing English language instruction on not less than a half-time equivalent basis.

In order to benefit from the suspension of the regulations, students must work with the responsible officer at their academic institution to have their student record in SEVIS annotated to include "Special Student Relief work authorization granted until December 31, 2011" and, where appropriate, "reduced course load authorized" in the comment box.

The changes made by the DOS are effective June 10, 2011, and will automatically end on December 31, 2011. The notice is published as 76 Fed. Reg. 33993 (June 10, 2011) and is reproduced in Appendix V of this Release.

Notes

[112] Employment authorization document (EAD). ■

10. Federal Case Summaries by Gerald Seipp**

Adjustment of Status/Denial of Continuance

In *Freire v. Holder*, 2011 WL 2090820 (2d Cir. 2011), the U.S. Court of Appeals for the Second Circuit vacated a decision by the Board of Immigration Appeals (BIA or Board), which refused to authorize a continuance of removal proceeding to enable the petitioner to pursue an application for adjustment of status under INA § 245(a) [8 USCA § 1255(a)] and over which U.S. Citizenship and Immigration Services (USCIS) had exclusive jurisdiction. The court held that, inasmuch as the Board failed to provide a rational explanation for its ruling that is tied to the record, it abused its discretion in denying Mr. Freire's motion for a remand or continuance.

The petitioner is a native of Brazil who was paroled into the U.S. in 1999 as a material witness in a criminal case. In 2003, his employer obtained an approved I-140 immigrant visa petition on his behalf. Mr. Freire then filed but subsequently withdrew an application for adjustment of status. In 2005, after his parole status expired, the Department of Homeland Security (DHS) commenced

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removal proceedings against him, alleging that he was an "arriving alien" who was not in possession of a valid entry document at the time of his application for admission. Mr. Freire denied his removability and asked the immigration judge (IJ) to terminate the proceeding without prejudice so that he could refile his adjustment application with USCIS. He also asked the IJ for a continuance because, in a separate case, the Second Circuit was considering the legal issue of whether arriving aliens were permitted to adjust status while in removal proceedings. The IJ denied the continuance, relying on former 8 CFR § 1245.1(a), found the petitioner ineligible to adjust, and ordered his removal to Brazil.

Before the BIA, Mr. Freire pointed out that, in May 2006, the Attorney General promulgated new regulations allowing USCIS to adjudicate adjustment applications of arriving aliens in removal proceedings. He also submitted evidence that he had filed his I-485 adjustment application with USCIS. He asked the BIA to "administratively close" or terminate proceedings or, alternatively, to either suspend making any decision or remand his case to the IJ with instructions to continue the matter until a decision is made by USCIS on his application. In 2007, the BIA dismissed the appeal and denied the remand motion, finding that neither the IJ nor the Board had jurisdiction over the adjustment matter and that it could not delay the removal proceedings pending USCIS' determination.

Mr. Freire then petitioned the Second Circuit, which approved a joint stipulation to remand his case to the Board to reconsider the appeal in light of an intervening decision by the appellate court, *Sheng Gao Ni v. Board of Immigration Appeals*, 520 F.3d 125 (2d Cir. 2008),[113] which held that an IJ's lack of jurisdiction to adjudicate an arriving alien's adjustment application did not, by itself, provide an adequate reason for the BIA to deny such an alien's motion to reopen pending pursuit of an adjustment application with USCIS. On remand, the BIA again denied Mr. Freire's request for a remand or continuance, reciting that it could not find it within its authority to grant relief based on an application over which it ultimately has no jurisdiction.

On return of the matter to the circuit court, it was explained that the court reviews the BIA's denial of a continuance for an abuse of discretion. The court recognized that the BIA correctly stated that IJs and the BIA do not have jurisdiction to adjudicate arriving aliens' applications for adjustment of status, but pointed out that this factor does not prevent IJs or the BIA from adjudicating motions for continuance in removal proceedings over which they already have jurisdiction. The court cited to a Board precedent decision, *Matter of Hashmi*, 24 I. & N. Dec. 785 (B.I.A. 2009),[114] which set out standards for determining a motion for a continuance where a visa petition is pending before USCIS, while recognizing that IJs do not have jurisdiction over such petitions.

The court found that the BIA's asserted justification for denying a continuance was deficient, under the reasoning of the court's *Ni* opinion, for failing to evaluate the merits of the instant case based on the specific facts of the record. It referred to a subsequently issued, BIA precedential decision, *Matter of Rajah*, 25 I. & N. Dec. 127 (B.I.A. 2009),[115] which applied the *Hashmi* factors to aliens seeking employment-based adjustment of status.

In remanding the case for the Board to apply the relevant factors, the court observed that the Board's decision to deny Mr. Freire a continuance did not satisfactorily explain its deviation from the BIA's decision in *Matter of Garcia*, 16 I. & N. Dec. 653 (B.I.A. 1978), modified on other grounds by *Matter of Arthur*, 20 I. & N. Dec. 475 (B.I.A. 1992),[116] announcing the general rule that a continuance should be granted where an alien establishes prima facie eligibility for adjustment of status. The court distinguished the Board's ruling in *Matter of Yauri*, 25 I. & N. Dec. 103 (B.I.A. 2009) (holding that it did not have jurisdiction to grant a motion to reopen based on an arriving alien's application for adjustment of status pending with USCIS as inapposite to the instant case involving a continuance request in a case that had not been concluded).

Justin Conlon, North Haven, Connecticut, for the petitioner. Lindsey Corliss, Tony West, Ade E. Bosque, and Mona Maria Yousif, U.S. Department of Justice (DOJ), Washington, D.C., for the respondent.

Adjustment of Status/Mandamus Action

In *Islam v. Heinauer*, 2011 WL 2066661 (N.D. Cal. 2011), the U.S. District Court for the Northern District of California granted a motion for summary judgment in favor of the defendant, Director of USCIS' Nebraska Service Center, who had delayed adjudication of the plaintiff's application for adjustment of status for three years pursuant to USCIS' "administrative hold" policy imposed on applicants deemed inadmissible on terrorist grounds who may benefit from an exemption as provided by the 2008 Consolidated Appropriations Act (CAA).[117] Although the court denied the government's motion to dismiss, it ruled that, under the particular circumstances, the three-year adjudication delay was not unreasonable and thus mandamus relief was not warranted.

The plaintiff, a citizen of Pakistan, entered the U.S. without inspection in 2000. He subsequently applied for asylum, which was granted in March 2007. His application included information to the effect that, in 1992, he joined

the Muhajir Qami Movement—Altaf Faction (MQM-A), an organization that meets the definition of a Tier III undesignated terrorist organization. He related that he helped to organize protests and gave and collected money for the MQM-A. In May 2008, the plaintiff filed his I-485 application, seeking adjustment of status from asylee to lawful permanent resident (LPR). As explained by District Judge Jeffrey S. White, the CAA amended and expanded the discretionary authority of the Secretary of the DHS to exempt certain terrorist-related inadmissibility grounds as they relate to Tier III terrorist organizations and that, pursuant to USCIS' policy memoranda, plaintiff Islam's I-485 was held in abeyance to determine if he might qualify for an exemption. Islam filed his federal court complaint in September 2010, citing to the mandamus statute, 28 USCA § 1361, as well as the Administrative Procedure Act (APA),[118] alleging that adjudication of his I-485 application was unreasonably delayed. The government defendants responded by filing a motion to dismiss, asserting a lack of subject matter jurisdiction, and both parties moved for summary judgment.

Judge White held that the court was not precluded from reviewing Islam's claims by INA § 242(a)(2)(B) [8 USCA § 1252(a)(2)(B)] (jurisdiction-stripping provision for discretionary decisions). He recognized the split of authority on this point, but noted that a number of district courts in the Ninth Circuit have concluded that this statute does not preclude the court from reviewing claims alleging unreasonable delays in processing of I-485s, including those filed by asylees associated with Tier III terrorist organizations—e.g., *Al-Rifahe v. Mayorkas*, 2011 WL 825668 (D. Minn. 2011). Judge White likewise rejected the defendants' contention that the court lacked jurisdiction pursuant to INA § 242(g) [8 USCA § 1252(g)], reasoning that this statute is limited to the removal context. He cited to district court decisions which have found that the Supreme Court, in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999),[119] determined that § 242(g), on its face, applies only to removal proceedings and should be construed narrowly. He proceeded to hold that Islam stated a viable claim.

Taking the facts in the light most favorable to the plaintiff, Judge White found that it is not only possible—but plausible—that Islam could benefit from final adjudication of his application. He noted that, in *Hassane v. Holder*, 2010 WL 2425993 (W.D. Wash. 2010), the court rejected the defendants' argument that Hassane failed to state a claim because he suffered no prejudice since, without DHS' exercise of discretion, the adjustment application would likely be denied.

In assessing the summary judgment motions, Judge White proceeded to apply the criteria enumerated in *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984), which formulated a "rule of reason" analysis and listing six factors to be considered. Judge White pointed out that neither INA § 209 [8 USCA § 1159] (asylee adjustment provision) nor INA § 212(d)(3)(B)(I) [8 USCA § 1182(b)(3)(B)(I)], the waiver statute added by the CAA, contains a specific time-frame in which to render decisions thereunder. At the same time, he acknowledged the sense of Congress, expressed in 8 USCA § 1571(b), that the processing of an immigration benefit application should be completed not later than 180 days after initial filing and that the delay in Islam's case far exceeded that timeline. However, Judge White credited the defendant's attestations that they have recently issued discretionary exemptions relating to various organizations other than the MQM-A and that they anticipate additional guidance relating to the adjudication of plaintiff's type of case—non-duress material support to a Tier III organization for which no group exemption exists—in the near future. He emphasized that Islam admitted to being a member of MQA-A. He rejected Islam's argument that the IJ's granting of asylee status necessarily constituted a conclusion that his activities with MQM-A were not a bar to admissibility. Thus, Judge White held that, on the existing record, Islam did not meet his burden of showing that issue preclusion bars the defendants' inadmissibility finding. Judge White observed that there were no allegations of impropriety by the defendants in the handling of Mr. Islam's case. He took cognizance of a recent decision—*AlShamsawi v. Holder*, 2011 WL 1870284 (D. Utah 2011)—holding that, in a similar case, a six-year delay was unreasonable[120] and concluded his opinion by expressing that he could foresee a point at which the delay in ruling on the plaintiff's I-485 would be unreasonable, but, based on the existing record, that time has not yet come.

Linda Baroudi and Robert B. Jobe, San Francisco, California, for the plaintiff. Erik R. Quick, DOJ, Washington, D.C., for the defendants.

Asylum/Withholding of Removal/Honor Killing / Credibility/Corroboration Requirement

In *Abraham v. Holder*, 2011 WL 2138149 (7th Cir. 2011), the U.S. Court of Appeals for the Seventh Circuit addressed a petition for review filed by a Syrian woman who claimed to fear persecution in the form of social ostracism and possible "honor killing" by her own Christian family due to her prior relationship with a Muslim gentleman. The court affirmed a decision by the BIA denying the petitioner's application for withholding of removal based on its determination that her testimony was lacking in credibility and insufficiently corroborated. In addition, the court held that it did not have jurisdiction to address the petitioner's claim that she was entitled

to an exemption from the untimely filing of her asylum application.

The petitioner related that she came from a small village in Syria populated by minority Assyrian Christians. While working on a farm, she met a Muslim man, Mahmood, with whom she enjoyed a dating relationship until he became abusive when she refused his entreaty to convert to Islam. Mahmood had threatened to expose the couple's relationship to Ms. Abraham's family unless she converted and, after he carried out this threat, the petitioner's father and brother beat the petitioner multiple times and threw her out of the house. Ms. Abraham then moved to the capital city, Damascus, where she met a U.S. citizen, Mr. Dawood, who was originally from Iraq. Ms. Abraham obtained a K-1 fiancé based on Dawood's petition and proceeded to enter the U.S. in May 2004. Although this visa status required Abraham to marry Dawood within 90 days, the marriage was never accomplished as Dawood did not fulfill his promise after his family told him "bad things" about her. After overstaying her nonimmigrant status for more than a year, the petitioner filed her application for asylum in November 2005. She was subsequently placed into removal proceedings for remaining in the U.S. longer than permitted.

Before the IJ the petitioner conceded the removal charge but advanced her claims for asylum and withholding of removal. She testified that, after breaking up with Dawood, she had planned to return to Syria, but she received a letter from her uncle in Syria, advising her not to return and conveying what she considered to be a veiled threat. The uncle warned her not to return to "this tarnished land" because her actions had shamed the entire tribe and because Mahmood had made threats on her family. After receiving this letter, Abraham asserted that she became afraid that her father or brother would kill her if she returned to Syria because she had disgraced the family's honor. She also presented the testimony of a cousin in an effort to substantiate her concerns. As observed the by circuit court, which referred to the U.S. Department of State 2009 Human Rights Report, murders of women, inaptly referred to as "honor killings," are well documented in Syria.

In denying relief, the IJ found that the asylum application was untimely—not filed within one year of arrival—and that the receipt of the uncle's letter did not constitute an extraordinary circumstance under INA § 208(a)(2)(D) [8 USCA § 1158(a)(2)(D)] justifying the belated filing as it related to the same circumstances that existed when Abraham first arrived in the U.S. In addressing her alternative claim for withholding of removal, the IJ found that the petitioner's testimony was not credible based on numerous inconsistencies in her description of the events surrounding her relationships with Mahmood and Dawood and the lack of corroborating evidence. The IJ found an absence of past persecution and concluded that the alleged abuse that she had suffered was not on account of a protected ground. The IJ also found that Abraham would not be seriously harmed if she returned to Syria in light of the fact that, before coming to the U.S., she had lived in Damascus for some period of time without experiencing any harm. In affirming the IJ's rulings, the BIA keyed in on the fact that Abraham failed to present corroborating evidence of critical elements of her claim. It noted, inter alia, that her brother was living in the U.S., but did not testify.

Citing to *Vasile v. Gonzales*, 417 F.3d 766 (7th Cir. 2005),[121] the circuit court indicated that it did not have jurisdiction to address the questions of fact and exercise of discretion pertaining to the rejection of Abraham's untimely asylum application. In regard to the withholding application, the court concluded that the IJ's adverse credibility finding was well supported by the numerous internal inconsistencies in the petitioner's testimony. Likewise, the court did not disturb the IJ's and BIA's assessment regarding the need for Abraham to produce corroboration of her claims. It rejected her contention that she should have been provided notice of this requirement, pointing out that INA § 208(b)(1)(B)(ii) [8 USCA § 1158(b)(1)(B)(ii)], added by the 2005 REAL ID Act,[122] clearly places immigrants on notice of the consequences for failing to provide corroborating evidence. The court credited the IJ for appreciating the "terrible problem" of honor killings in Syria and that punishment for the killings is virtually non-existent, but accepted the IJ's finding that, in light of all of the evidence, it was unlikely that the petitioner would be harmed if she returned to Syria. Accordingly, the court dismissed in part, and denied in part, her petition for review.

Edwin T. Gania, Chicago, Illinois, for the petitioner. Kevin J. Conway and Nancy E. Friedman, DOJ, Washington, D.C., for the respondent.

Cancellation of Removal/Aggravated Felony Bar/ Burden of Proof

In *Salem v. Holder*, 2011 WL 1998330 (4th Cir. 2011), the U.S. Court of Appeals for the Fourth Circuit denied a petition for review filed by an LPR whose cancellation of removal application under INA § 240A(a) [8 USCA § 1229b(a)] was denied by the IJ and the BIA, which had concluded that the petitioner failed to satisfy his burden to demonstrate that his Virginia conviction for petit larceny was not an aggravated felony notwithstanding the IJ's determination that the government could not establish that he was "deportable" as an aggravated felon. Although recognizing a circuit court conflict on this point of law, the Fourth Circuit expressed its agreement with the BIA,

which applied Congress' burden-shifting framework under INA § 240(c)(3) and (4) and 8 CFR § 1240.8(a) in concluding that the petitioner had not satisfied his burden.

The petitioner lawfully immigrated to the U.S. in 1966 after leaving territory then belonging to Jordan, which is now controlled by Israel and the Palestinian authority. Mr. Salem asserts that he is stateless as a result of this transfer of sovereignty of his homeland. The court noted that he has amassed a substantial criminal record in this country, including the aforesaid Virginia conviction, which occurred in 2007. This matter was classified as a "third subsequent" offense under Va. Code Ann. § 18.2-96. After entry of a plea of guilty, the sentence was enhanced based on recidivism. In 2008, DHS initiated removal proceedings under two separate grounds: INA § 237(a)(2)(A)(ii) [8 USCA § 1227(a)(2)(A)(ii)] (two or more crimes involving moral turpitude) and INA § 237(a)(2)(iii) [8 USCA § 1227(a)(2)(iii)] (aggravated felony theft conviction as defined by INA § 101(a)(43)(G) [8 USCA § 1101(a)(43)(G)]—theft offense, including receipt of stolen property for which the term of imprisonment is at least one year).

Before the IJ, Mr. Salem conceded that he was removable for his moral turpitude crimes, but denied the "aggravated-felony" charge. The IJ concluded that the Virginia larceny statute was divisible as it criminalizes both wrongful and fraudulent takings of property, with the latter offense not constituting an "aggravated felony" under the INA as was determined by the Fourth Circuit, in *Soliman v. Gonzales*, 419 F.3d 276 (4th Cir. 2005).[123] The IJ proceeded to find that the government failed to meet its burden to demonstrate, by clear and convincing evidence, that the offense involved wrongful taking as opposed to fraud. Consequently, the IJ did not sustain the aggravated-felony charge. At the same time, the IJ ruled that Salem failed to carry his burden of showing by a preponderance of the evidence that he had not been convicted of an aggravated felony. Accordingly, the IJ ruled that Salem was not eligible for cancellation relief, and the BIA affirmed this result.

The Fourth Circuit analyzed the applicable burdens as formalized by the 2005 REAL ID Act, which amended INA § 240. In rejecting Mr. Salem's argument that a noncitizen satisfies his or her burden of proof to demonstrate that he or she has not been convicted of an aggravated felony by presenting an inconclusive, though, complete record of conviction, the court found that the BIA's ruling denying Salem's request for relief was faithful to the plain meaning of the statutory text governing eligibility for cancellation of removal. It cited to a Tenth Circuit decision, *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009),[124] which presented a similar scenario and came to the same conclusion. The court recognized that both the Second and Ninth Circuits have come to the opposite conclusion on this point of law—*Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008),[125] and *Rosas-Castaneda v. Holder*, 630 F.3d 881 (9th Cir. 2011)[126]—but concluded that the Tenth Circuit's approach hews more closely to the relevant statutory text.

The court held that once the government established removability for the moral turpitude offenses, this caused the burden to shift to Mr. Salem to demonstrate eligibility for cancellation for removal by showing, among other things, that he had not been convicted of an aggravated felony, referring to INA § 240A(c)(4)(i). The court rejected several other arguments advanced by the petitioner, including his contention that the BIA impermissibly imposed a higher burden of proof than preponderance of the evidence by requiring him to produce evidence outside the record of conviction in contravention of the "modified categorical approach." It stressed that Salem made no attempt to offer additional evidence beyond the record of conviction, so the court did not need to address the proper scope and limit—if any—of a noncitizen's evidentiary presentation when seeking relief from removal.[127]

Simon Yehuda, Sandoval-Moshenberg, Thomas A. Elliot, Fabienne Chatain, and Thomas H. Tousley, Elliot & Maycock, Washington, D.C., for the petitioner. Daniel I. Smulow, Tony West, and Mark C. Walters, DOJ, Washington, D.C., for the respondent.

Derivative Citizenship/Meaning of "Legitimated"

In *Watson v. Holder*, 2011 WL 2119768 (2d Cir. 2011), the U.S. Court of Appeals for the Second Circuit introduced its opinion by articulating the question presented for its review, namely whether the petitioner has been "legitimated" under Jamaican law within the meaning of INA § 101(c)(1) [8 USCA § 1101(c)(1)], even though his parents never married, so as to have qualified for derivative citizenship as a consequence of the naturalization of his father. In remanding the matter to the BIA, which had rejected Mr. Watson's U.S. citizenship claim, the court instructed the Board to (1) clarify precisely how it interprets the concept of legitimation as set forth in the INA and (2) justify how it arrived at that particular interpretation. The court further directed that, upon accomplishing that analysis, the BIA should again explain how its understanding of "legitimation" applies to Jamaican law and the facts of the instant case.

The petitioner, a native of Jamaica, arrived in the U.S. as a lawful permanent resident in 1998 to live with his father and stepmother (the latter being a U.S. citizen). The petitioner's father naturalized to U.S. citizenship in 2002, when the petitioner was 17 years old. In 2004, Watson was convicted of attempted robbery in New York

state court, and, in 2007, he was convicted for attempted sale of cocaine. Removal proceedings were commenced against him in 2008 based on those convictions. Before the IJ, the petitioner acknowledged his criminal record, but maintained that he became a U.S. citizen in 2002 when his father naturalized. Unable to convince USCIS of his derivative citizenship, the petitioner pressed his argument before the IJ on the basis that he was living with his father in the U.S. when his father naturalized. The IJ did not accept this argument, and the BIA affirmed the IJ's removal order, which relied on its prior precedent, *Matter of Hines*, 24 I. & N. Dec. 544 (B.I.A. 2008)[128] (establishing that children born out-of-wedlock—as Watson concedes he was—are generally not treated as "legitimate" under Jamaican law).

As explained by the court, under INA § 320(a) [8 USCA § 1431(a)], a child born outside the U.S. automatically becomes a U.S. citizen upon fulfillment of the following conditions: (1) at least one parent is a U.S. citizen, whether by birth or naturalization, (2) the child is under the age of 18 years, and (3) the child is residing in the U.S. in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence. The court proceeded to set forth the definition of child, under INA § 101(c)(1):

> an unmarried person under 21 years of age and includes a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in the U.S. or elsewhere … if such legitimation … takes place before the child reaches the age of 16 years … and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

The court clarified that the only issue in dispute was whether Watson qualifies as a "child" of his U.S.-citizen father. The government argued that Watson is not a child because his biological parents never married, thus rendering him illegitimate under Jamaican law, and, alternatively, that he was not in the legal custody of his father at birth. The Second Circuit observed that, for many years, the Board had acknowledged that the concept of legitimacy turned on the legal rights conferred by applicable law rather than on mere labels codified in the statute. It noted that, in *Matter of Clahar*, 18 I. & N. Dec. 1 (B.I.A. 1981), the Board held that the Jamaican Status of Children Act of 1976 had abolished the concept of legitimacy in that country but that 27 years later, the BIA explicitly overruled *Clahar* in its new decision, *Matter of Hines*, supra. The court intimated that, in reviewing the disparate positions by the BIA on this point of law, it had two lingering concerns which warranted resolution by the agency in the first instance: (1) clarification of the precise definition that the BIA has adopted in determining whether a "child" has been legitimated under the law of a particular jurisdiction for purposes of § 101(c)(1) and (2) clarification of the legal and/or logical basis for the BIA's interpretation. The court asked the rhetorical question of whether the BIA recognizes a difference between legitimate and illegitimate that is purely formalistic or whether some substantive discrimination in the law is necessary. The court pointed out that its prior decision, *Lau v. Kiley*, 563 F.2d 543 (2d Cir. 1977), in considering the proper interpretation of "child" in the context of visa applications and construing INA § 101(b)(1), held that the distinction between legitimate and illegitimate children must have some effect and must have been designed to distinguish between the two categories in order that they have different rights or obligations.

In its remand order, the court indicated that the BIA may wish to explore whether Watson was in the legal custody of his father at any time during Watson's stay in Jamaica and that it would be helpful for the Board to seek further guidance on the interplay between the Legitimation Act of 1909 and the Status of Children Act of 1976 in Jamaican law.

Richard W. Mark, S. Scott Roehm, and Rene A Kathawala, Orrick, Herrington & Sutcliffe, LLP, New York City, New York, for the petitioner. Dana M. Camilleri, Tony West, Ernesto H. Molina, Jr., DOJ, Washington, D.C., for the respondent.

Derivative Citizenship Claim as Defense to Removal/Claim Preclusion

In *Johnson v. Whitehead*, 2011 WL 1998333 (4th Cir. 2011), the U.S. Court of Appeals for the Fourth Circuit consolidated an appeal from a district court decision and a petition for review from a removal order issued by the BIA and proceeded to rule that the petitioner's claim of derivative citizenship based on his father's naturalization prior to the petitioner's 18th birthday was not viable since his father had never been married to his mother. It ruled that INA § 242(b)(9) [8 USCA § 1252(b)(9)] and INA § 360(a) [8 USCA § 1503(a)] served to prohibit Johnson from obtaining review of his citizenship claims in a habeas corpus petition, so it affirmed the district court's jurisdictional dismissal of his petition. It also concluded that Johnson was properly subject to removal as an alien convicted of drug and firearms convictions and that he did not qualify for U.S. citizenship under former INA § 321(a)(3) [former 8 USCA § 1432(a)(3)].

The petitioner is a native of Jamaica who entered the U.S. as an LPR in October 1972 at the age of seven. Although his father became a naturalized citizen the following year, his father failed to submit a citizenship

application for his son. In 1989, Johnson was convicted of carrying a firearm during a drug-trafficking crime in violation of federal statute, 18 USCA § 924(c)(1), and, that same year, he was convicted in state court of unlawful possession of a controlled substance and aggravated assault. In 1992, the INS commenced a deportation proceeding based on these criminal offenses, but the IJ terminated the case for apparently unarticulated reasons. In 1996, the INS issued another order to show cause, claiming that Johnson was deportable on account of the drug and firearm convictions. The IJ terminated proceedings in 1998, stating that Johnson "appears to be a U.S. citizen by [his] father's [naturalization]." The INS did not appeal this order. In December 1996, while the deportation matter was pending, Mr. Johnson filed a Form N-600, Application for a Certificate of Citizenship, claiming that he derived citizenship by virtue of his father's naturalization. In 2000, the INS denied this application, reasoning that the former statute required a legal separation of the applicant's parents, which did not apply to Johnson's situation as his parents had never married.

In 2002, the petitioner was convicted of possession of a firearm by a convicted felon in violation of 18 USCA § 922(g)(1) and was sentenced to 108 months' imprisonment. In 2008, DHS initiated removal proceedings, alleging that Johnson was removable by virtue of his 2002 and 1989 convictions. Johnson argued before the IJ that preclusion principles barred DHS from relitigating the issue of his U.S. citizenship because of the IJ's 1998 order. The new IJ denied Johnson's motion to terminate and ordered removal, reasoning that DHS was not precluded from litigating the issue of Johnson's citizenship because the 1998 termination order did not make any definitive citizenship finding and that, pursuant to *Duvall v. Atty. Gen. of U.S.*, 436 F.3d 382 (3d Cir. 2006),[129] Johnson's commission of an additional crime after the 1998 proceedings lifted any preclusion bar that might otherwise have existed. Additionally, the IJ ruled, on the merits, that Johnson did not derive U.S. citizenship by virtue of his father's naturalization. The BIA affirmed the IJ's ruling in all respects.

In 2008, the petitioner filed his petition for a writ of habeas corpus in the district court, which promptly dismissed it, leading him to file an appeal with the circuit court, which held the case in abeyance pending the BIA's decision in the removal matter. The habeas appeal was later consolidated with the petition for review of the Board's removal order. The circuit court had no trouble denying the habeas appeal given the aforesaid statutory bars requiring exhaustion of administrative remedies and the channeling of appeals from removal orders directly to the court of appeals.

In regard to the merits of the petitioner's citizenship claim, which was embraced by the petition for review, the court declared that the Board read the statute in accordance with its unambiguous meaning. It rejected the petitioner's contention that the "legal separation" requirement was satisfied even though his parents never married inasmuch as his mother severed family ties before his father naturalized. The Fourth Circuit noted that every circuit, including the Fourth in a prior case, that has considered this issue has found a marriage requirement in the term "legal separation" as contained in former INA § 321(a)(3)—e.g,. *Lewis v. Gonzales*, 481 F.3d 125 (2d Cir. 2007),[130] and *Afeta v. Gonzales*, 467 F.3d 402 (4th Cir. 2006).[131] It observed that the former statute contrasted "legal separation" with "out of wedlock." It emphasized that Johnson could not acquire citizenship under the "legal separation" route as his parents never married and that he had not sought to establish citizenship as an "out of wedlock" child because his mother never naturalized. The court likewise rejected the petitioner's constitutional challenge to this former statutory scheme, citing to several decisions, including *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001),[132] which recognize the plenary power of Congress in the immigration context.

The court proceeded to address the "issue preclusion" argument advanced by the petitioner. It considered that the IJ's 1998 order never purported to declare Johnson to be a U.S. citizen and emphasized that neither IJs nor the BIA have any such power to confer citizenship, citing to *Barnes v. Holder*, 625 F.3d 801 (4th Cir. 2010).[133] It also pointed out that no common-law preclusion principle applies to an agency "when a statutory purpose [in opposition to the preclusion rule] is evident." It noted that there are multiple statutory bases for removing Johnson because of his criminal misconduct. It declared that granting Johnson's request would trample on both agency practice and congressional intent.

Judge Roger L. Gregory dissented. He expressed his belief that the BIA's interpretation of the phrase "legal separation" in former INA § 321(a)(3) violates the equal protection guarantee of the Fifth Amendment's Due Process Clause. He considered that Johnson's mother's abandonment of her family effectuated a "legal separation" such as to justify a "flexible" reading of the statute in favor of the petitioner.

Angad Singh, Washington College of Law, and Ali A. Deydoun, Washington, D.C., for the petitioner-appellant. Eric Warren Marstele, Tony West, and Ada E. Bosque, DOJ, Washington, D.C., for the respondents.

Expedited Removal Order Under INA § 235(b)/ Habeas Corpus

In *Smith v. U.S. Customs and Border Protection*, 2011 WL 1988382 (W.D. Wash. 2011), the U.S. District Court for the Western District of Washington adopted a recommendation by its magistrate judge to dismiss a habeas corpus petition filed by a Canadian citizen who was subjected to an expedited removal order by U.S. border officials pursuant to INA § 235(b)(1) [8 USCA § 1225(b)(1)]. District Judge James L. Robart agreed with Magistrate Judge James P. Donohue that the court lacked jurisdiction to review the merits of the removal order under the strictures imposed by INA § 242(e) [8 USCA § 1252(e)] and that, as a Canadian citizen seeking admission to the U.S., petitioner Smith could not assert a constitutional due process claim to overcome the jurisdictional bar.

On October 12, 2009, Mr. Smith arrived at the Oroville, Washington, port of entry (POE), seeking admission to the U.S. He stated that the purpose of his visit was to travel to Arizona to sky dive, take photographs, and have fun. Although he declared to the inspector that he had no tobacco and was carrying $8,000, a search of his motor home revealed the presence of nine cartons of cigarettes, $15,000 in cash, and $10,000 in endorsed travelers checks. The U.S. Customs and Border Protection (CBP) officers also found flyers describing Smith's work as a photographer and his availability from October 2009 to April 2010 in Arizona and further advertising "flexible rates & schedule specializing in skydiving, motorcycle events, aircraft, and nudes." In his sworn statement, extracted by the CBP, Smith related that he only receives a "jump ticket" as compensation for his work, but that people can also buy his photos through his website. He admitted that he was carrying monetary instruments in excess of the amount required to be reported ($10,000), and that he was aware of the reporting requirements but purposely chose to evade the reporting obligation.

CBP determined that he was inadmissible to the U.S. pursuant to INA § 212(a)(7)(A)(i)(I) [8 USCA § 1182(a)(7)(A)(i)(I)] on the basis that he was an immigrant not in possession of a valid entry document who intended to work in the U.S. as a photographer for compensation. Accordingly, he was returned to Canada under the expedited removal process. The order also subjects him to a five-year bar to reenter the U.S. (under INA § 212(a)(9)(A)(i) [8 USCA § 1182(a)(9)(A)(i)]). Although CBP also seized his monetary instruments, it later mitigated the statutory penalties and returned the money upon his payment of $1,000. After CBP refused his counsel's request to vacate the removal order, Mr. Smith initiated his habeas corpus petition in December 2010, and the government promptly filed their motion to dismiss.

As explained by the magistrate, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[134] substantially amended the INA by, among other things, establishing a new summary removal process for adjudicating claims of aliens who arrive in the U.S. without proper documentation. Under the newly enacted provision, INA § 235(b), if an immigration officer determines that an alien is inadmissible under INA § 212(a)(6)(C) (material misrepresentation) or § 212(a)(7) (lack of proper documentation), the officer shall order the alien removed from the U.S. without further hearing or review unless the alien indicates an intention to apply for asylum under INA § 208 [8 USCA § 1158] or a fear of persecution.

Magistrate Donohue further explained that, if the alien is found inadmissible for any other reason, he or she would be referred for regular nonexpedited proceedings (before an IJ) conducted under INA § 240 [8 USCA § 1229a]. He then outlined the statutory scheme for judicial review of expedited removal orders, under INA § 242, including the limitations under subsection (e), which provide for habeas review of whether the petitioner is an alien, whether the petitioner was ordered removed under INA § 235(b), and whether the petitioner can prove by a preponderance of evidence that he or she is an alien lawfully admitted for permanent residence or is a refugee or has been granted non-terminated asylum. That subsection explicitly provides that there shall be no review of whether the alien is actually inadmissible or entitled to relief from removal.

Although Mr. Smith did not dispute his identity or the fact that he is an alien or claim that he was a LPR or refugee, he nonetheless endeavored to challenge the removal order, arguing that the statute does not apply to Canadian nonimmigrant visitors for whom documentary requirements (possession of visa) are waived. In addition, he contended that the statutory provisions limiting habeas review violate his right to due process and habeas review under the Constitution's Suspension Clause. Magistrate Donohue emphasized that, pursuant to INA § 242(a)(2)(A)(i) [8 USCA § 1252(a)(2)(A)(i)], no court has jurisdiction to review any individual determination or to entertain any cause of action arising from or relating to the implementation or operation of an order of removal pursuant to INA § 235(b)(1) and that habeas review under subsection (e) is severely limited (as outlined above). He construed these provisions as foreclosing any review of the merits of the order. He cited to circuit court authority, as supporting this viewpoint: e.g., *Garcia de Rincon v. Department of Homeland Sec.*, 539 F.3d 1133 (9th Cir. 2008);[135] *Galindo-Romero v. Holder*, 621 F.3d 924 (9th Cir. 2010);[136] *Khan v. Holder*, 608 F.3d 325 (7th Cir. 2010);[137] and *Brumme v. I.N.S.*, 275 F.3d 443 (5th Cir. 2001).[138] He cited language from the Seventh Circuit's *Khan* decision for the recognition that the expedited process is fraught

with the risk of arbitrary, mistaken, or discriminatory behavior. However, he agreed with the other decisions, adhering to the jurisdictional limits as clearly imposed by Congress.

In rejecting the constitutional challenges, the court pointed out that aliens seeking admission at the border do not possess any constitutional rights with respect to their application for admission, citing to case authority on this point, including *American Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 59 (D.D.C. 1998).

Robert Pauw, Gibbs, Houston Pauw, Seattle, Washington, and Sarah Murphy and William Z. Reich, Serotte, Reich & Wilson, Buffalo, New York, for the petitioner. Erez Reuveni, DOJ, Washington, D.C., for the respondents.

Reinstatement of Removal/Asylum/Nicaraguan Adjustment and Central American Relief Act

In *Ixcot v. Holder*, 2011 WL 2138234 (9th Cir. 2011), the U.S. Court of Appeals for the Ninth Circuit identified the issue to be decided in the first sentence of its opinion as whether IIRIRA's reinstatement provision, codified at INA § 241(a)(5) [8 USCA § 1231(a)(5)], applies retroactively to a petitioner who applied for discretionary relief prior to the IIRIRA's effective date. Answering this question in the negative, the Ninth Circuit indicated that it was following prior decisions from the First, Seventh, Tenth, and Eleventh Circuits, which held that INA § 241(a)(5) is impermissibly retroactive when applied to such petitioners, and thus it granted Mr. Ixcot's petition for review in part. Mr. Ixcot, a native and citizen of Guatemala, entered the U.S. without inspection around February 1989 and was immediately apprehended by the INS. At that time, he used another name and claimed to be a citizen of El Salvador. In deportation proceedings involving a group of aliens before an IJ, he expressed a fear of returning to El Salvador, explaining that his family was embroiled in a property dispute. The IJ concluded that any issues that Ixcot had with deportation to El Salvador were problems of a personal nature that could not support an asylum claim. Consequently, the IJ issued deportation orders against Mr. Ixcot and several other individuals in a group-hearing context. Although Ixcot filed an appeal with the BIA, he did not file a brief, so the BIA summarily dismissed the appeal in September 1990.

In April 1993, the petitioner filed an affirmative asylum application under his real name, claiming a fear of guerillas in his native Guatemala. Four months later, he visited Guatemala for three weeks to marry his fiancée, and returned to the U.S. again without inspection. Twelve years later, in September 2005, Ixcot attended his asylum interview at which a determination was made that he was not eligible for relief under the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA)[139] because he had failed to register for so-called "*ABC* benefits."[140] No decision was rendered on his asylum application; rather, he was required to appear for two additional asylum interviews. In the meantime, he added his Guatemalan wife as a derivative applicant.

At the last interview, in May 2009, the petitioner was confronted with a U.S. Immigration and Customs Enforcement (ICE) officer who ran a fingerprint interview revealing the prior deportation order, respecting which Ixcot had used a different identity. In response to questioning as to whether he feared persecution if removed from the U.S., he answered in the affirmative, stating that his whole family, including his mother and father, had been killed in Guatemala. Thereafter, instead of adjudicating his asylum application, DHS processed Ixcot for reinstatement of the 1989 deportation order under the post-IIRIRA regime, and he responded by filing his petition for review with the circuit court.

The court explained that the INA, enacted in 1952, included a reinstatement provision, but it only applied to aliens deported for certain unlawful activities, such as smuggling, marriage fraud, certain criminal convictions, and terrorism activities. It noted that this former provision did not apply to Mr. Ixcot. It further clarified that the aforesaid 1996 amendment, effective April 1, 1997, does allow affected aliens to seek withholding of removal pursuant to INA § 241(b)(3)(A) [8 USCA § 1231(b)(3)(A)]. In assessing the retroactive scope of the new provision, the court followed the two-step test set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). It noted that, in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006),[141] the U.S. Supreme Court examined § 241(a)(5), added by the IIRIRA, and concluded that Congress had not expressly prescribed this new reinstatement provision's temporal reach, so the Ninth Circuit proceeded to the second inquiry: whether the statute, as applied, would have a "retroactive effect." It pointed out that in *Fernandez-Vargas,* the Supreme Court found that IIRIRA's reinstatement provision was not impermissibly retroactive in that case as Mr. Fernandez-Vargas had not applied for any relief from removal before the IIRIRA's effective date despite having had the opportunity to do so. The Ninth Circuit emphasized that, by way of contrast, Mr. Ixcot had filed an affirmative application for asylum in 1993. The court referred to four decisions[142] from other circuits, holding that the new reinstatement provision could not be applied against aliens who had applied for adjustment of status before the new law went into effect, and found it immaterial that Ixcot's application involved asylum. Thus, the court held that Ixcot was entitled to an adjudication of the merits of his 18-year-old asylum application. However, the court refused to address the

merits of his denied NACARA application due to the jurisdiction-stripping provision set forth in § 309(c)(5)(C)(ii) of the IIRIRA.

Matt Adams, Northwest Immigrant Rights Project, Seattle, Washington, for the petitioner. Andrew Jacob Oliveira and Michael Christopher Heyse, DOJ, Washington, D.C., for the respondent.

Notes

[113] *Sheng Gao Ni* is summarized in 85 Interpreter Releases 1075, 1077 (Apr. 7, 2008).

[114] *Matter of Hasmi* is examined in 86 Interpreter Releases 1181 (Apr. 27, 2009).

[115] *Matter of Rajah* is discussed in 86 Interpreter Releases 2816 (Nov. 16, 2009).

[116] In *Matter of Arthur*, the Board ruled that a motion to reopen to apply for adjustment of status based on a marriage entered into after the commencement of proceedings could not be granted unless the visa petition had been approved. *Matter of Arthur* is summarized in 66 Interpreter Releases 1245 (Oct. 5, 1992). The Board modified its *Matter of Arthur* decision in *Matter of Velarde,* discussed in 79 Interpreter Releases 401 (Mar. 18, 2002).

[117] Pub. L. No. 110-161, 121 Stat. 1844 (Dec. 26, 2007), discussed in 85 Interpreter Releases 7 (Jan. 2, 2008).

[118] 5 USCA § 704.

[119] *Reno v. American-Arab Anti-Discrimination Committee* is examined in 76 Interpreter Releases 313 (Mar. 1, 1999).

[120] *AlShamsawi* is summarized in 88 Interpreter Releases 1377 (June 6, 2011).

[121] *Vasile* is summarized in 82 Interpreter Release 1351 (Aug. 22, 2005).

[122] The REAL ID Act, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005), is discussed and reproduced in 82 Interpreter Releases 813, 829 (May 16, 2005). See also Validity, Construction, and Application of REAL ID Act of 2005, 11 A.L.R. Fed. 2d 1.

[123] *Soliman* is summarized in 82 Interpreter Releases 1555 (Sept. 26, 2005).

[124] *Garcia* is summarized in 86 Interpreter Releases 2733, 2737 (Nov. 9, 2009).

[125] *Martinez* is summarized in 86 Interpreter Releases 139, 141 (Jan. 12, 2009).

[126] *Rosas-Castaneda* is summarized in 88 Interpreter Releases 208, 211 (Jan. 17, 2011).

[127] For an examination of the law regarding aggravated-felony crimes and their immigration-related ramifications, see Seipp, "The Aggravated Felony Concept in Immigration Law: Traps for the Unwary and Opportunities for the Knowledgeable," 02-01 Immigration Briefings 1 (Jan. 2002). See also Kemper, "What Constitutes 'Aggravated Felony' for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 USCA § 1227(a)(2)(A)(iii))," 01-11 Immigration Briefings 1 (Nov. 2001) and 168 A.L.R. Fed. 575.

[128] *Hines* is discussed in 85 Interpreter Releases 1650 (June 9, 2008).

[129] *Duvall* is discussed in 83 Interpreter Releases 350 (Feb. 20, 2006).

[130] *Lewis* is summarized in 84 Interpreter Releases 854, 858 (Apr. 9, 2007).

[131] *Afeta* is summarized in 83 Interpreter Releases 2383, 2386 (Nov. 6, 2006).

[132] *Nguyen* is discussed in 78 Interpreter Releases 1021 (June 18, 2001).

[133] *Barnes* is summarized in 87 Interpreter Releases 2262, 2267 (Nov. 22, 2010).

[134] Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

[135] *Garcia de Rincon* is summarized in 85 Interpreter Releases 2422 (Sept. 8, 2008).

[136] *Galindo-Romero* is summarized in 87 Interpreter Releases 1795, 1800 (Sept. 13, 2010).

[137] *Khan* is summarized in 87 Interpreter Releases 1244, 1246 (June 21, 2010).

[138] *Brumme* is summarized in 79 Interpreter Releases 378, 380 (Mar. 11, 2002).

[139] Title 2 of Pub. L. No. 105-100, 111 Stat. 2160, 2193 (Nov. 19, 1997) (as amended by Technical Corrections to the NACARA, Pub. L. No. 105-139, 111 Stat. 2644 (Dec. 2, 1997)). For discussion of NACARA, see Lovo, "Nicaraguan Adjustment and Central American Relief Act 'NACARA,'" 98-11 Immigration Briefings 1 (Nov. 1998), and Validity, Construction, and Application of Nicaraguan Adjustment and Central American Relief Act, 191 A.L.R. Fed. 343.

[140] *American Baptist Churches v. Thornburg*, 760 F.Supp. 796 (N.D. Cal. 1991), class-action registration. For a discussion of *ABC* and its ultimate settlement, see 67 Interpreter Releases 1480 (Dec. 21, 1990). See also 79 Interpreter Releases 904 (June 10, 2002); Smith, "The ABC Settlement: A Guide for Class Members and Advocates," 72 Interpreter Releases 1497 (Nov. 6, 1995).

[141] *Fernandez-Vargas* is examined in 83 Interpreter Releases 1289 (July 3, 2006).

[142] *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Faiz-Mohammad v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005); *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084 (10th Cir. 2007), summarized in 84 Interpreter Releases 1033, 1038 (May 7, 2007); *Sarmiento Cisneros v. U.S. Atty. Gen.*, 381 F.3d 1277 (11th Cir. 2004),

summarized in 81 Interpreter Releases 1232, 1237 (Sept. 13, 2004). ■

11. Supreme Court Vacates *Lozano v. City of Hazleton*, Remands Case to Third Circuit for Reconsideration in Light of *Chamber of Commerce v. Whiting*

In *City of Hazleton, Pa. v. Lozano*, 2011 WL 2175213 (Mem) (U.S. June 6, 2011) , the Supreme Court granted the petition for a writ of certiorari,[143] vacated the judgment in *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010),[144] in which the Court of Appeals for the Third Circuit upheld a permanent injunction prohibiting the City of Hazleton, Pennsylvania, from enforcing two local ordinances that attempt to regulate the employment of, and the provision of rental housing to, certain noncitizens, and remanded the case to the Third Circuit for further consideration in light of *Chamber of Commerce of U.S. v. Whiting*, 2011 WL 2039365 (U.S. May 26, 2011), in which the Supreme Court held that the Legal Arizona Workers Act (LAWA),[145] which provides that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked and requires all Arizona employers to use the E-Verify system to confirm that their employees are authorized to work in the U.S.,[146] is not preempted by federal law.[147]

Notes

[143] *City of Hazleton, Pennsylvania v. Lozano*, 2010 WL 5069545 (Dec. 8, 2010).

[144] The Third Circuit's decision is discussed in 87 Interpreter Releases 1821 (Sept. 20, 2010).

[145] Ariz. Rev. Stat. Ann. § 23-212.

[146] E-Verify is an Internet-based system operated by U.S. Citizenship and Immigration Services (USCIS) in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees.

[147] *Chamber of Commerce of U.S. v. Whiting* is discussed in 88 Interpreter Releases 1361 (June 6, 2011). ■

12. BALCA Vacates Denial of Application for Labor Certification Where It Appeared that Neither Employer Nor Employer's Attorney were Aware of CO's Decision

In *Matter of Michael K. Rosner*, 2011-PER-00197 and 2011-PER-00825 (BALCA June 2, 2011) (Associate Chief Administrative Law Judge William S. Colwell), the employer filed an application for labor certification on behalf of the alien for the position of housekeeper for a private residence. On April 11, 2008, the certifying officer (CO) denied the application on the ground that the employer could not be verified as a bona fide entity under the regulatory definition of "employer" at 20 CFR § 656.3. The Board of Labor Certification Appeals (BALCA or Board) noted:

> The CO's denial letter did not state why it could not verify the Employer's bona fides. We note that the Appeal File shows that the CO tagged the FEIN on the Form ETA 9089.[148] Thus it appears that the FEIN was invalid or did not match the Rosner household. However, there might be some other reason that the CO was questioning whether the Rosner household was a bona fide business entity.

On April 23, 2008, the employer's attorney submitted a request for review or reconsideration and attached copies of Mr. Rosner's driver's license, his U.S. Army identification card, a W-3 tax form, a year end summary report for 2006 showing payment of wages by Mr. Rosner to two individuals (one of whom was the alien), and an electric utility bill. The summary report appears to have been prepared for Mr. Rosner by a company named Home/Work Solutions, Inc., and bears a FEIN which is identical to the FEIN listed on the Form ETA 9089. The Board said that it is not clear whether this FEIN belongs to Mr. Rosner or to Home/Work Solutions, Inc. On August 21, 2008, the employer's attorney wrote to the CO, requesting that a decision be made on the motion for reconsideration or review.

On September 14, 2009, an analyst from the Atlanta National Processing Center (NPC) issued a letter stating that the NPC had received the employer's request for reconsideration or review and that, before the NPC would process the request, the employer must submit to the CO a signed statement verifying that the job opportunity listed in Section H of the Form ETA 9089 is available and that the employer is sponsoring the alien listed in Section J of Form ETA 9089. The copy of this letter contained in the corrected appeal file does not show to whom it was directed.

On December 17, 2009, the CO issued a second denial in which he stated that Mr. Rosner had failed to respond to the September 14, 2009, request for additional information. This denial letter was addressed to the employer's attorney, with a "cc" to Mr. Rosner, and stated in detail the requirements for requesting review of the denial, including the 30-calendar-day time limit.

By letter postmarked November 19, 2010, the employer's attorney asked for reconsideration or review,

arguing that the employer had verified his identity with the June 2, 2009, filing by submitting his driver's license and Army identification card. The Board said that it is not clear from the face of the letter whether it was in response to the December 17, 2009, second denial letter or a plea like the letter of August 21, 2008, that a decision be made on the original motion for reconsideration or review.

The CO assumed that the attorney's November 19, 2010, letter was a request for reconsideration of the second denial letter. Because the request was not made within 30 days of the date of the second denial determination, the CO did not process the request but instead sent an appeal file to the Board. In a memorandum to the Board, the CO took the position that the employer had made an untimely request for reconsideration. The Board said that there was no indication whether this memorandum was also sent to the employer or the employer's attorney.

The employer's attorney submitted a letter indicating that the employer never received the CO's December 17, 2009, denial letter and attached an affidavit signed by Mr. Rosner attesting to that fact and requesting that the application be reopened. The Board observed that the affidavit contains a street mailing address for Mr. Rosner that is different from the address stated in the Form ETA 9089.

The Board held as follows:

> Upon careful review, we find that the preponderance of the evidence is that the neither the Employer nor the Employer's attorney were aware of the CO's second denial at the time that the attorney submitted the November 19, 2010 request for reconsideration or review. There is nothing on the face of that letter that refers to the CO's December 17, 2009 second denial letter, and it is clear in the body of the letter that the Employer's attorney was still addressing the original ground for denial (that the CO could not verify Mr. Rosner as a bona fide business entity) rather than the ground for denial stated in the second denial letter (that Mr. Rosner had failed to respond to the request for additional information affirming that the job is available and that he is sponsoring the Alien for the position). Nor did the letter make any reference to being submitted untimely, which is unusual given that it was submitted approximately 11 months after the second denial. Mr. Rosner attests in his affidavit on appeal that he did not receive the December 17, 2009 second denial letter. Although Mr. Rosner's attorney did not also proffer an affidavit attesting that he too did not receive the December 17, 2009 second denial letter, we still find that the weight of the evidence is that neither the Employer nor his attorney received the second denial letter.
>
> Based on the foregoing, we decline to affirm the denial of certification. Rather, we find that the Employer did not have notice of the CO's second denial of certification, and must be given a full and fair opportunity to respond to the second denial. Accordingly, we vacate the denial of certification and remand for the CO to determine whether the business entity and sponsorship issues have been resolved, and if so, to consider the merits of the application.

In a footnote, the Board added:

> We note that Mr. Rosner provided notice to the Board by letter dated February 7, 2011 that he has moved to Bethesda, Maryland. His address at the time of the filing of the Form 9089 was in Silver Spring, Maryland. The Silver Spring, Maryland address was also on the driver's license, W-3 form, and electrical bill provided with the April 23, 2008 motion for reconsideration/review. The CO, however, requested the additional information in September 2009. The record does not disclose when Mr. Rosner's address changed. However, we note that a possible explanation for why Mr. Rosner never replied to the CO's request for additional information is that he had moved and the mail was not forwarded.

Notes

[148] A FEIN—federal employer identification number or federal tax identification number—is used by the Internal Revenue Service to identify a business entity. ■

13. NLRB Updates Procedure for Addressing Immigration Status Issues That Arise During NLRB Proceedings

On June 7, 2011, the National Labor Relations Board (NLRB) issued Memorandum OM 11-62, "Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings," which is reproduced in Appendix VI of this Release. OM 11-62 supplements GC 02-06,[149] "Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After Hoffman Plastic Compounds, Inc."[150] In OM 11-62, NLRB Associate General Counsel (AGC) Richard A. Siegel observes that, while the National Labor Relations Act (NLRA)[151] protects all employees covered by the Act regardless of their immigration status, such status may affect available remedies and "occasionally present other practical difficulties" for the enforcement of the Act. He states that, while immigration status is generally not relevant either in representation proceedings or at the merits stage of unfair labor practice proceedings, immigration issues

are sometimes "unavoidably interjected" into NLRB proceedings. For example, immigration status may be "inextricably intertwined" with an unfair labor practice, such as where "immigration threats or related conduct" is the basis of the unfair labor practice allegation. In cases where immigration status "is of particular significance," the NLRB may seek the assistance of U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), or U.S. Customs and Border Protection (CBP) "to advance the effective enforcement of the NLRA." AGC Siegel concludes the memorandum by saying, "Although Regions should not raise immigration issues *sua sponte*, in cases where such issues arise, immigration agencies may grant immigration remedies or favorably exercise discretion in order to assist the NLRB in the enforcement of the NLRA."

Notes

[149] GC 02-06 is discussed in 79 Interpreter Releases 1237 (Aug. 19, 2002).

[150] In *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002), the Supreme Court held, in a 5-to-4 decision, that federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986)), foreclosed the NLRB from awarding backpay to an undocumented alien who had never been legally authorized to work in the U.S.

[151] 29 USCA §§ 151 et seq. ■

14. Florida Governor Amends Executive Order Regarding E-Verify

On May 27, 2011, Florida Governor Rick Scott issued Exec. Order 11-116, Verification of Employment Status, which supersedes Exec. Order 11-02 (Jan. 4, 2011). Whereas Exec. Order 11-02 required state agencies to verify the employment eligibility of "all current and prospective agency employees," Exec. Order 11-116 requires state agencies to verify the employment eligibility of "all new agency employees" through the U.S. Department of Homeland Security's E-Verify system.[152] E-Verify is an Internet-based system that compares information from an employee's Form I-9, Employment Eligibility Verification, to data from U.S. Citizenship and Immigration Services and Social Security Administration records to confirm employment eligibility.

Notes

[152] See http://www.flgov.com/wp-content/uploads/orders/2011/11-116-suspend.pdf. ■

15. Newly Introduced Legislation

The following immigration-related bills have been introduced in the House of Representatives since May 12, 2011. There were no such bills introduced in the Senate.

May 13, 2011

Rep. Mike Pompeo (R-Kan.) introduced H.R. 1921,[153] a bill to provide for certain enhanced border security measures and for other purposes.

Del. Kilili Sablan (D-N. Mar. I.) introduced H.R. 1927,[154] a bill to extend the prohibition on asylum applications in the case of aliens arriving from the Commonwealth of the Northern Mariana Islands and for other purposes.

May 23, 2011

Rep. Lamar Smith (R-Tex.) introduced H.R. 1932,[155] a bill to amend the INA to provide for extensions of detention of certain aliens ordered removed and for other purposes.

Rep. Smith also introduced H.R. 1933,[156] a bill to amend the INA to modify the requirements for admission of nonimmigrant nurses in health professional shortage areas.

May 31, 2011

Rep. Kenny E. Marchant (R-Tex.) introduced H.R. 2064,[157] a bill to amend the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[158] to allow employers to verify the identity and employment eligibility of an employee from the time of application for employment.

June 3, 2011

Rep. Mazie K. Hirono (D-Haw.) introduced H.R. 2115,[159] a bill to exempt children of certain Filipino World War II veterans from the numerical limitations on immigrant visas.

Rep. Hirono also introduced H.R. 2116,[160] a bill to exempt children of certain Filipino World War II veterans from the numerical limitations on immigrant visas and for other purposes.

Rep. Chris Smith (R-N.J.) introduced H.R. 2121,[161] a bill to deny the entry into the U.S. of certain members of the senior leadership of the Government of the People's Republic of China and individuals who have committed human rights abuses in the People's Republic of China and for other purposes.

Notes

[153] 157 Cong. Rec. H3301 (daily ed. May 13, 2011).

[154] 157 Cong. Rec. H3302 (daily ed. May 13, 2011).

[155] 157 Cong. Rec. H3341 (daily ed. May 23, 2011).

[156] 157 Cong. Rec. H3341 (daily ed. May 23, 2011).

[157] 157 Cong. Rec. H3805 (daily ed. May 31, 2011).

[158] Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

[159] 157 Cong. Rec. H4034 (daily ed. June 3, 2011).

[160] 157 Cong. Rec. H4034 (daily ed. June 3, 2011).

[161] 157 Cong. Rec. H4034 (daily ed. June 3, 2011). ■

16. Supreme Court Denies Petition for Writ of Certiorari in California Tuition Case

In *Martinez v. Regents of University of California*, 2011 WL 531608 (Mem) (U.S. June 6, 2011), the U.S. Supreme Court denied a petition for a writ of certiorari[162] in which the two questions presented were:

> 1. Whether a state statute that defies the congressional intent behind 8 U.S.C. § 1623 by providing resident tuition rates at public postsecondary institutions to illegal aliens and declaring that it is granting those benefits to illegal aliens not on the basis of "residence" in the state, but on the basis of attending a high school in the state, is expressly preempted.
>
> 2. Whether a court must undertake conflict preemption analysis after concluding that an express preemption provision does not apply in a case involving both types of preemption claims.

Thus, the decision of the California Supreme Court in *Martinez v. The Regents of the University of California*, 50 Cal. 4th 1277, 117 Cal. Rptr. 3d 359, 241 P.3d 855 (2010), that Cal. Educ. Code § 68130.5(a), which makes certain undocumented noncitizens exempt from paying nonresident tuition, does not violate 8 USCA § 1623, which provides that "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident,"[163] stands.

The California statute provides, in pertinent part, that notwithstanding any other provision of law, a student, other than a nonimmigrant alien within the meaning of INA § 101(a)(15) [8 USCA § 1101(a)(15)], who meets all of the following requirements is exempt from paying nonresident tuition at the California State University and the California Community Colleges: (1) high school attendance in California for three or more years, (2) graduation from a California high school or attainment of the equivalent thereof, (3) registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-02 academic year, and (4) in the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status or will file an application as soon as he or she is eligible to do so.

Notes

[162] *Martinez v. Regents of the University of California*, 2011 WL 549168 (Feb. 14, 2011).

[163] The California Supreme Court's decision is discussed in 87 Interpreter Releases 2260 (Nov. 22, 2010). ■

17. DOS Posts Reciprocity Schedules for Curacao and Sint Maarten, Updates Others

The Department of State (DOS) has posted reciprocity schedules for Curacao and Sint Maarten. Both schedules have the visa classification charts and accompanying footnotes. Both also contain a notice under the "Documents" section that that information will come later. The schedule for Sint Maarten includes a "Visa Issuing Posts" section with relevant information. The reciprocity schedule for Curacao is reproduced in Appendix VII, and the schedule for Sint Maarten is reproduced in Appendix VIII.

Visa Reciprocity Schedules Updated. On June 2, 2011, the DOS updated the documents section in the reciprocity schedule for Liberia and added a panel physician's address in the reciprocity schedule for Madagascar. On June 6, 2011, the DOS updated the police records section in the reciprocity schedule for Sweden. The complete reciprocity schedules can be found on the DOS website by going to http://travel.state.gov/visa/frvi/reciprocity/reciprocity_3272.html and selecting the country from the drop-down menu. ■

18. Forms Update

The Department of State (DOS) and U.S. Citizenship and Immigration Services (USCIS) have issued updated forms recently. DOS forms are available on the DOS website at http://www.state.gov/m/a/dir/forms. USCIS forms and their instructions are available in pdf format

on USCIS' website—http://www.uscis.gov. Click on "FORMS" at the top of the page and then select the desired form by number.

DOS

Form DS-156. The new version of Form DS-156, Nonimmigrant Visa Application, is dated June 2011. The only change is to the expiration date, which is now June 30, 2014. This edition is now the only acceptable version of Form DS-156.

USCIS

Form G-1145. A new edition of Form G-1145, E-Notification of Application/Petition Acceptance, has been released with a May 25, 2011, date. USCIS has added the following to the end of the text under the heading "How Can I Request E-Mails or Text Messages": If you reside overseas and file Form G-1145, you will not be able to receive a text message notifying you that your application/petition has been accepted. The expiration date of the form has also been updated to May 31, 2012, and can now be found in the Paperwork Reduction Act paragraph. Previous editions of Form G-1145, including the May 10, 2010, edition, are still acceptable.

Form I-134. USCIS released a new version of Form I-134, Affidavit of Support, which is dated May 25, 2011, and expires on May 31, 2012. The form does not contain any changes; however, the instructions have been updated on page 2 where the Address Changes section provides updated information on how an alien should notify USCIS of an address change and on page 3 where the Paperwork Reduction Act paragraph has been updated with a revised address for submitting comments on the burden estimate/information collection. USCIS continues to accept prior editions of the form, including the May 21, 2010, edition.

Form I-290B. The March 14, 2011, edition of Form I-290B, Notice of Appeal or Motion, was rereleased with one change—on the bottom of page 4 of the instructions, "This form expires May 31, 2012." has been added to the last paragraph.

Form I-589. The latest version of Form I-589, Application for Asylum and for Withholding of Removal, is dated May 25, 2011. Changes to the form and the instructions are limited to page 14 of the instructions where the Paperwork Reduction Act paragraph has been updated with a reduced burden estimate (12 minutes rather than 12 hours per response), an updated address for sending comments on the burden estimate/information collection, and the form's new expiration date—May 31, 2012—which was formerly on the top-right corner of the form and its instructions. Applicants may also use previous editions of Form I-589, including the April 5, 2010, version.

Form I-881. USCIS has reissued the November 23, 2010, edition of Form I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105-100, NACARA). The agency has added a Privacy Act Notice section to page 11 of the instructions and has correspondingly amended the Part VIII heading on the previous page to include the new section. No other changes were made to the form or the instructions.

Form M-274. A revised Form M-274, Handbook for Employers, which is intended to aid employers in better understanding the Form I-9, Employment Eligibility Verification, process,[164] is now available. This new version is dated June 1, 2011. USCIS has updated the answers to several questions in Part Seven of the Handbook, including question 50 on page 46 ("I recently hired someone who checked the fourth box in the immigration status attestation section on Section 1 of Form I-9, indicating that he is an alien. However, his Form I-94 does not contain an expiration date, which appears to be required by the form. What should I do?") and questions 60 through 64, which "apply to employers and employees located in the CNMI [Commonwealth of the Northern Mariana Islands] only." Form M-274 is available on USCIS' website at http://www.uscis.gov/files/form/m-274.pdf.

Notes

[164] U.S. employers are required to verify the identity and employment authorization of every worker they hire after November 6, 1986, regardless of the employee's immigration status. To comply with the law, employers must complete Form I-9. ■

19. CBP Designates Native American Tribal Card Issued by Pascua Yaqui Tribe as WHTI-Compliant

On June 9, 2011, U.S. Customs and Border Protection (CBP) issued a notice indicating that Commissioner Alan Bersin has designated an approved Native American Tribal Card issued by the Pascua Yaqui Tribe to U.S. citizens as an acceptable travel document for purposes of the Western Hemisphere Travel Initiative (WHTI).[165] Accordingly, the card may be used to denote identity and U.S. citizenship of Pascua Yaqui members entering the U.S. from contiguous territory or adjacent islands at land and sea ports of entry. The notice was published in 76 Fed. Reg. 33776 (June 9, 2011).

The Pascua Yaqui Tribe is the first federally recognized Indian tribe in the nation to bring forth a WHTI-compliant enhanced tribal card. More information about the card is available on the Pascua Yaqui Tribe website at http://1.usa.gov/mJJJne.

In the notice, CBP states that acceptance and use of the WHTI-compliant tribal card is voluntary for tribe members. An individual who is denied a WHTI-compliant tribal card may still apply for a passport or other WHTI-compliant document.[166]

Notes

[165] The WHTI is a joint Department of State-Department of Homeland Security plan that implemented a key 9/11 Commission recommendation to establish document requirements for travelers entering the U.S. who were previously exempt, including citizens of the U.S., Canada, and Bermuda.

[166] For a list of WHTI-compliant documents, see http://www.getyouhome.gov/html/lang_eng/index.html. ■

20. Immigration Briefings on Laws of General Application and Asylum Claims

Determining when the enforcement of a law of general application is really just a pretext for persecution can present a particular challenge to adjudicators of asylum applications. In these cases, persecutors may attempt to hide their persecutory motives by cloaking them in the legitimacy of a lawful prosecution. Other factors, however, such as a country's political history, the selectiveness of law enforcement, deprivation of due process, and disproportionate punishment, may point to an attempt to punish for a perceived characteristic. These cases require a more exacting review to determine the actual motive of a potential persecutor. The May Immigration Briefings, entitled "Laws of General Application and Asylum Claims," 11-05 Immigration Briefings 1 (May 2011), looks at how the Board of Immigration Appeals and courts have addressed these cases and argues that a totality of the circumstances analysis is best suited to consider all factors that indicate an alleged persecutor's motive.

The author of this Briefing is James Feroli, an attorney with the Immigrant and Refugee Appellate Center in Alexandria, Virginia, specializing in immigration appellate issues. Mr. Feroli is a graduate of Boston College and the University of Maryland, School of Law.

Written by leading practitioners and commentators, Immigration Briefings provides analysis of current immigration and nationality issues. Published monthly, Immigration Briefings is available in print and electronically through Westlaw®. Readers who would like subscription or back-issue information should contact the publisher at (800) 221-9428. Those who are interested in contributing an article or ideas for a future issue may contact the attorney editor, Beverly Jacklin, at West, 50 East Broad Street, Rochester, NY 14694; telephone (585) 627-2504; or e-mail beverly.jacklin@thomsonreuters.com. ■

21. DHS Posts Privacy Impact Assessments to Its Website

The Department of Homeland Security (DHS) published a notice in the May 27, 2011, Federal Register that it has made 16 privacy impact assessments (PIAs) available on its website. These PIAs were approved and published on the Privacy Office's website between January 8, 2011, and March 31, 2011. The following immigration-related PIAs were included:

- Bond Management Information System (BMIS) Web Release 2.2 Update
- H-1B Visa Cap Registration Notice of Proposed Rule Making (NPRM)
- Migrant Information Tracking System
- E-Verify Self Check Service
- ICE Subpoena System

The Federal Register notice, 76 Fed. Reg. 30952 (May 27, 2011), which is reproduced in Appendix IX of this Release, includes a brief summary of each program, the DHS component responsible for it, and the date on which the PIA was approved. The PIAs will be available on the DHS website (http://www.dhs.gov/privacy, under the link for "Privacy Impact Assessments") until July 26, 2011, after which they may be obtained by contacting the DHS Privacy Office. ■

22. Noteworthy

USCIS Stakeholder Teleconference Invitation. U.S. Citizenship and Immigration Services' (USCIS') Vermont Service Center invites participation in a stakeholder engagement to discuss I-130 VAWA[167] cases and T[168] and U[169] nonimmigrant cases on June 30, 2011, at 1:00 p.m. (eastern time). The dial-in number is 888-592-9603; the passcode is 2983924.

Secure Communities Expands. Bartholomew, Brown, Clay, Crawford, Daviess, Delaware, Gibson, Greene, and Johnson counties in Indiana, as well as all 37 jurisdictions in Puerto Rico, have joined the Secure Communities program pursuant to which state and local law-enforcement officers use biometrics to identify noncitizens in state prisons and local jails and bring them to the attention of U.S. Immigration and Customs Enforcement (ICE). As of June 7, 2011, the program is in

place in 1,379 jurisdictions in 43 states; see http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf.

Note: The Boston Globe reports that on June 6, 2011, Massachusetts Governor Deval Patrick announced that the Commonwealth will not participate in the Secure Communities program.[170] Massachusetts Public Safety and Security Secretary Mary Beth Heffernan wrote a letter to ICE indicating that she and Governor Patrick are "dubious" of the state taking on the role of immigration enforcement and "even more skeptical" of the impact that Secure Communities could have on state residents. The Patrick administration expressed concern that Secure Communities is not meeting its main goal of deporting hard-core criminals. Massachusetts joins Illinois[171] and New York State[172] in rejecting the program.

PERM Processing Times Updated. PERM processing times as of June 6, 2011, can be viewed at http://icert.doleta.gov/.

ICE Updates List of SEVP-Approved Schools. On June 8, 2011, ICE updated the list of Student and Exchange Visitor Program (SEVP)-approved schools, which is available on the ICE website at http://www.ice.gov/doclib/sevis/pdf/ApprovedSchools.pdf.

EOIR Opens Twitter Account. The Executive Office for Immigration Review (EOIR) has opened a Twitter account to assist the agency in providing interested parties with information about news, events, and announcements through a social media channel. Follow DOJ_EOIR on Twitter for EOIR updates. Note, however, that the EOIR's website, http://www.justice.gov/eoir, will remain the primary source of information online.

Testimony. Statement of Alan Bersin, Commissioner, U.S. Customs and Border Protection, before the Senate Committee on Homeland Security and Governmental Affairs, Ad Hoc Subcommittee on Disaster Recovery and Intergovernmental Affairs on "Border Corruption: Assessing Customs and Border Protection and The Department of Homeland Security Inspector General's Office Collaboration in the Fight to Prevent Corruption" (June 9, 2011), available on the Department of Homeland Security (DHS) website at http://www.dhs.gov/ynews/testimony/testimony_1307549850535.shtm.

Reports. Transactional Records Access Clearinghouse (TRAC), "New Judge Hiring Fails to Stem Rising Immigration Case Backlog" (June 7, 2011), available on the Syracuse University website at http://trac.syr.edu/immigration/reports/250/. The report contains a link to the "Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts," http://trac.syr.edu/phptools/immigration/court_backlog/.

Notes

[167] The Violence Against Women Act (VAWA), Title IV of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (Sept. 13, 1994)

[168] The T classification was created by § 107(e) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000). It was designed for eligible victims of severe forms of trafficking in persons who aid the government with their case against the traffickers and who can establish that they would suffer extreme hardship involving unusual and severe harm if they were removed from the U.S. after having completed their assistance to law enforcement. See Kaufka, "T Nonimmigrant Visas and Protection and Relief for Victims of Human Trafficking: A Practitioner's Guide," 06-09 Immigration Briefings 1 (Sept. 2006).

[169] The U classification was created by the Battered Immigrant Women Protection Act of 2000 (BIWPA), part of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000) (codified as amended in scattered sections of 42 USCA §§ 1501 to 1513). INA § 101(a)(15)(U) [8 USCA § 1101(a)(15)(U)]. The U visa offers protection to victims of crimes who step forward to assist law enforcement in investigating and prosecuting cases of domestic violence, sexual assault, trafficking, and other crimes. See Minwalla, "Protecting Noncitizen Crime Victims Under The New U Visa Interim Regulations," 08-01 Immigration Briefings 1 (Jan. 2008).

[170] See http://www.boston.com/Boston/metrodesk/2011/06/secure-communities/fU45XhhjsoGSGWYxVg2N8O/index.html.

[171] See 88 Interpreter Releases 1248 (May 9, 2011).

[172] See 88 Interpreter Releases 1385 (June 6, 2011). ■

Appendix I

IMMIGRANT VISA PREFERENCE NUMBERS FOR July 2011
(Based on State Dept. information released on June 10, 2011)

FAMILY PREFERENCES

	All Chargeability Areas	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	01MAY04	01MAY04	01MAY04	08MAR93	15APR96
2A*	22MAR08	22MAR08	22MAR08	15FEB08	22MAR08
2B	01JUL03	01JUL03	01JUL03	22SEP92	22SEP00
3rd	15JUL01	15JUL01	15JUL01	15NOV92	22MAR92
4th	08MAR00	08MAR00	08MAR00	01MAR96	15MAY88

*NOTE: For July, F2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 15FEB08. F2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 15FEB08 and earlier than 22MAR08. (All F2A numbers provided for MEXICO are exempt from the per-country limit; there are no F2A numbers for MEXICO subject to per-country limit.)

EMPLOYMENT PREFERENCES

	All Chargeability Areas	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	08MAR07	08MAR07	C	C
3rd	08OCT05	01JUL04	01MAY02	01JUL05	08OCT05
Other Workers	22NOV04	22APR03	01MAY02	22NOV04	22NOV04
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas/Regional Centers	C	C	C	C	C
5th Pilot Programs	C	C	C	C	C

NOTE: DIVERSITY IMMIGRANT (DV) CATEGORY: For July, immigrant visa numbers in the diversity visa (DV) category are available to qualified DV-2011 applicants chargeable to all regions and eligible countries as follows (visas are available only for applicants with DV lottery rank numbers below the cut-off number): Africa: 57,600, except Egypt: 35,000, Ethiopia: 30,650, and Nigeria: 18,500; Asia: 33,775; Europe: 33,000, except Uzbekistan: 28,200; North America (Bahamas): 12; Oceania: 1,400; South America and the Caribbean: 1,400.

Appendix II

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

May 9, 2011 **PM-602-0038**

Policy Memorandum

SUBJECT: Requests to Expedite Adjudication of Form I-601, Application for Waiver of Grounds of Inadmissibility, filed by individuals outside the United States; *Adjudicator's Field Manual* (*AFM*) Update AD11-10

Purpose
This Policy Memorandum (PM) provides guidelines on how U.S. Citizenship and Immigration Services (USCIS) processes requests to expedite the adjudication of Forms I-601 filed by individuals outside the United States. These guidelines will be included in the *AFM* Chapter 41.7 and in the revised version of International Operations Division Field Guidance for Form I-601 adjudications.

Scope
Unless specifically exempted herein, this memorandum applies to and is binding on all USCIS employees adjudicating Forms I-601 filed by individuals outside the United States.

Authority
8 CFR 212.7 governs USCIS adjudication of Form I-601.

Background
It has been USCIS's longstanding policy to accept requests to expedite processing of petitions or applications where the applicant or the petitioner demonstrates reasons that merit expedited processing of a petition or application. Consistent with this policy, an applicant may request that the adjudication of a Form I-601 be expedited. Requests to expedite in the Form I-601 adjudication context present unique challenges.

Almost all Form I-601 applicants outside the United States have an interest in expeditious processing given that most are required to establish extreme hardship to a qualifying family member in order for USCIS to consider whether to exercise its discretion to waive the bar to an applicant's entry into the United States. However, some applicants may be experiencing extraordinary circumstances that present the kind of compelling and urgent, time-sensitive reasons that merit expedited processing of a Form I-601. This memorandum provides guidelines on responding to requests to expedite Forms I-601 filed by applicants overseas.

Policy
Subject to case management requirements and resource constraints, USCIS managers overseas may, in extraordinary circumstances, exercise discretion on a case-by-case basis to approve a request to

Appendix II, continued

expedite adjudication of a Form I-601.[1] The strong desire to immigrate to the United States as soon as possible is not by itself "extraordinary." The types of extraordinary circumstances that may, generally, merit expedited processing are those in which there are time-sensitive and compelling situations that necessitate the applicant's presence in the United States sooner than would be possible if the application were processed under normal processing times. There may also be other time-sensitive circumstances that merit expeditious processing for other reasons, principally where the failure to expedite the adjudication could result in significant delays in family reunification. For example, the applicant may be ineligible to receive a visa in the following month due to forecasted visa regression, and therefore faces an even more prolonged and unanticipated separation from family members if the application is not expedited. Similarly, the applicant may request that the case be expedited to prevent a child not covered by the Child Status Protection Act aging out before visa issuance. There also may be circumstances in which a prior USCIS error merits expeditious processing of a request.

Implementation

The *AFM* and the International Operations Division Field Guidance for Form I-601 adjudications are revised as follows:

☞ (1) A new Chapter 41.7 is added to read:

41.7 Expeditious Adjudication of Waivers of Inadmissibility.

(a) Applications for Waiver of Inadmissibility Filed by Applicants in the United States. [Reserved]

(b) Applications for Waiver of Inadmissibility by Applicants Outside the United States.

(1) Applicability.

The guidance set forth in this chapter applies to any applications for waiver of inadmissibility filed by an applicant who is outside the United States, including both applications adjudicated by Overseas Field Offices and applications filed from Canada and adjudicated by the Vermont Service Center. This guidance shall also apply to any Form I-212 application submitted in conjunction with a Form I-601 application for which there has been a request or decision to expedite processing.

(2) Criteria.

Subject to case management requirements and resource constraints, USCIS managers overseas may, in extraordinary circumstances, exercise discretion to decide on a case-by-case basis to approve a request to expedite adjudication of a Form I-601. The strong desire to immigrate to the United States as soon as possible is not, itself "extraordinary."

[1] When a Form I-212 application is submitted in conjunction with a Form I-601application, a request or decision to expedite the adjudication of the Form I-601 application will be treated as a request or decision to expedite the accompanying Form I-212 application.

Appendix II, continued

The types of extraordinary circumstances that may, generally, merit expedited processing of a Form I-601 are those in which there are time-sensitive and compelling situations that necessitate the applicant's presence in the United States sooner than would be possible if the application were processed under normal processing times or other time-sensitive circumstances that nonetheless merit expeditious processing, principally where the failure to expedite the adjudication could result in significant delays in family reunification. Those situations may include, but are not limited to, situations in which the applicant establishes one or more of the following:

- The applicant has urgent and critical medical needs that cannot be addressed in the applicant's country;
- An applicant's family member in the United States has a serious medical condition and has urgent and critical medical needs related to that condition that require the applicant to assist the family member in the United States;
- The applicant is faced with urgent circumstances related to the death or serious illness of a family member;
- The applicant or qualifying family member is a particularly vulnerable individual due to age, serious medical condition, or disability and this vulnerability is exacerbated by the applicant's presence outside the United States;
- The applicant is at risk of serious harm due to personal circumstances distinct from the general safety conditions of those living in the applicant's country;
- It would be in the national interest of the United States to have the applicant in the United States (for example, the applicant's presence in the United States is urgently required for work with a U.S. government entity); or
- As described in a request from or for a member of the Armed Forces of the United States:
    - The applicant's qualifying family member is a member of the military who is deployed or will soon be deployed; and
    - The applicant demonstrates that, in light of the deployment there are compelling reasons to expedite the request due to the impact of the applicant's absence from the United States on the applicant, the qualifying family member, or their children, if any.

The above non-exhaustive list describes some examples of situations that may, depending on the facts of the case, merit a discretionary approval of a request to expedite adjudication of a waiver request. However, these are not the only circumstances that may

Appendix II, continued

warrant expeditious processing. There may also be other time-sensitive circumstances that do not necessitate the applicant's presence in the United States sooner than would be possible under normal processing times, but that nonetheless merit expeditious processing. For example, the applicant may be ineligible to receive a visa in the following month due to forecasted visa regression and therefore faces an even more prolonged and unanticipated separation from family members if the application is not expedited. Similarly, the applicant may request that the case be expedited to prevent a child not covered by the Child Status Protection Act from aging out before visa issuance. There also may be circumstances in which a prior USCIS error merits expeditious processing of a request.

(3) Documentation.

Requests must include sufficient evidence to support the claimed need for expedited processing or an explanation of why that evidence is not available. For example, if the request is based on an urgent, serious medical condition, the applicant should provide a medical report. If the request is based on urgent need by a U.S. government entity to have the applicant in the United States, the applicant should provide a letter from the entity supporting the expedite request.

(4) Public Information, Notices and Outreach.

Overseas Field Office Directors will provide instructions for expediting requests on Department of State and USCIS web pages. All requests to expedite will be reviewed within 5 business days of receipt of the request and, if the decision is to approve the request to expedite, the applicant will be notified within 10 business days of receipt of the request. In particularly urgent cases, staff will make every effort to notify the applicant of an approval to expedite a request as soon as the decision to expedite has been made. Because of limited overseas resources and concerns that responding to all requests to expedite will divert those limited resources from timely adjudicating all applications, overseas field offices are not required to provide negative responses to requests to expedite. Overseas field offices will notify applicants that, if they do not receive a response to their request to expedite within 15 days from the date of notice of receipt of the request, their request to expedite may be presumed to be denied. This information will be posted on all overseas office websites. In addition, Overseas Field Office Directors will include this information on their auto-reply message that is sent out upon receipt of electronically received requests. In response to non-electronically submitted requests, overseas field offices will send out a notice of receipt that contains this same information. See **Appendix 41-5**.

Note: The Vermont Service Center (VSC) receives all Forms I-601 and I-212 filed by Canadian residents with the U.S. Embassy or Consulate in Canada. The Department of State forwards the Forms I-601 and I-212 to the VSC for adjudication. This guidance does not change existing filing instructions and the VSC will continue to send out appropriate CLAIMS3-generated notices for that workload.

Appendix II, continued

PM-602-0038: Requests to Expedite Adjudication of Form I-601, *Application for Waiver of Grounds of Inadmissibility*, filed by individuals outside the United States; *AFM* Update AD11-10
Page 5

☞ (2) A new Appendix 41-5 is added to read:

[SEE ATTACHED]

☞ (3) The *AFM* **Transmittal Memoranda** button is revised by adding, in numerical order, a new entry to read:

AD11-10 5/9/2011	**Chapter 41.7** **Appendix 41-5**	Adds guidance on consideration of requests for expeditious adjudication of Forms I-601 filed overseas

Use
This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information
Questions or suggestions regarding this PM should be addressed through appropriate channels to the International Operations Program Manager for Forms I-601.

Appendix II, continued

Appendix 41-5: Template for Notice of Receipt of Request to Expedite I-601 Processing for Applicants Outside the U.S.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Name of Office
Street Address
City, Country Postal Code

U.S. Citizenship and Immigration Services

Notice of Receipt of Request to Expedite Form I-601 Processing for Applicant Residing Overseas

Dear NAME OF APPLICANT:

We have received your request to expedite the processing of your *Application for Waiver of Grounds of Inadmissibility* (Form I-601). Most Form I-601 applicants residing outside of the United States have a strong interest in expeditious processing, because they are claiming that their inability to reside in the United States is causing extreme hardship to a qualifying family member.

We strive to process all cases within designated processing times. At this time, the average processing time for Forms I-601 in this office is [**insert number of months**]. Expedited processing is rarely granted. In order to receive the privilege of expedited processing, you must establish that there are time-sensitive and compelling circumstances that necessitate your presence in the United States prior to the average processing time.

Please be advised that we are unable to respond to each individual request for expedited processing. You will receive notification if your request to expedite the processing of your Form I-601 is granted. If you have not received a response within 15 business days from the date of this letter, please presume that regrettably your request for expedited processing has been denied.

For more information about the filing requirements for inadmissibility waivers, please visit the USCIS website at www.uscis.gov, or [*For Canadian applicants filing with the VSC, enter appropriate information for contacting customer service. For all applicants filing with USCIS overseas offices provide link to office website*.]

Sincerely,

[Name]
Field Office Director

www.uscis.gov

Appendix III

INTERIM MEMO FOR COMMENT
Posted: 06-09-2011
Comment period ends: 06-22-2011
This memo is in effect until further notice.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

PM 602-0039

June 7, 2011

Policy Memorandum

SUBJECT: The Role of USCIS District Directors in the Board of Immigration Appeals Recognition and Accreditation Process; Revisions to the *Adjudicator's Field Manual,* New Chapter 12.6, AFM Update AD 11-34

Purpose
This guidance clarifies the role and responsibilities of USCIS District Directors related to the recognition and accreditation process administered by the Board of Immigration Appeals (BIA), Executive Office for Immigration Review (EOIR), Department of Justice.

Scope
Unless specifically exempted herein, this policy memorandum (PM) applies to all USCIS employees.

Authority
Section 292 of the Immigration and Nationality Act; 8 U.S.C. § 1362; Title 8, Code of Federal Regulations (CFR) sections 103.2(a) (3), 292.1 and 292.2.

Background
One of the main pillars of the USCIS effort to combat the unauthorized practice of immigration law is building the capacity of interested stakeholders to provide legal services to the immigrant community. A key component of building stakeholder capacity is ensuring that USCIS provides thorough and timely input on all applications filed by organizations seeking recognition and requests for accreditation of individuals as representatives.

An applicant or a petitioner may be represented by an attorney in the United States or an accredited representative of a recognized organization. In matters outside the geographical confines of the United States, applicants or petitioners may also be represented by an attorney admitted to practice in that country. *See* 8 CFR 103.2(a) (3). Department of Homeland Security (DHS) officials have the discretion to permit a law student, law school graduate, or a reputable

Appendix III, continued

individual to appear in matters before them, subject to the requirements in 8 CFR 292.1(a)(2) and (3).

Non-profit religious, charitable, social service, or similar organizations established in the United States may submit an application to the BIA to obtain status as a recognized organization on Form EOIR-31 "Request for Recognition as a Non-Profit Religious, Charitable, Social Service, or Similar Organization." 8 CFR 292.2(b). A separate Form EOIR-31 must be filed for each branch office of an organization seeking recognition before the BIA. In order to qualify as a recognized organization, organizations must demonstrate that they have adequate knowledge of and experience with immigration law, charge or accept only nominal fees, and assess no excessive membership dues for persons given assistance. The organization must serve a copy of Form EOIR-31 on the local District Director for USCIS and the local Chief Counsel for ICE with jurisdiction over the area in which the organization's office is located. The applicant must include in the application package proof that a copy has been submitted to USCIS and ICE. By regulation, USCIS and ICE have thirty days from the date of receipt of Form EOIR-31 to: (1) request a specified period of time in which to conduct an investigation or obtain relevant information regarding the applicant, or (2) submit to the BIA recommendations for approval or disapproval, including the reasons therefore, and serve a copy of the recommendation on the organization. If the BIA approves a request for time to conduct an investigation or remands the application to the District Director for further information, USCIS and ICE must forward the results to the BIA, along with their recommendations. The BIA will review the USCIS and ICE recommendations and decide whether to approve or deny the application, or seek more information from either the organization or DHS. If USCIS or ICE recommends disapproval, the organization has thirty days to file a response with the BIA. USCIS must serve a copy of its recommendation, either for approval or denial, to the organization.

A grant of recognition does not need to be renewed; however, the BIA may withdraw the recognition of any organization that fails to maintain the qualifications required for such recognition. 8 CFR 292.2(c). A USCIS District Director will initiate withdrawal of recognition proceedings after an investigation reveals that the organization has failed to maintain its qualifications. Following this investigation and a subsequent hearing before an Immigration Judge, a final decision on whether to withdraw recognition must be rendered by the BIA. The final decision will be reported to the District Director. 8 CFR 292.2(c).

A recognized organization may apply to have one or more non-attorneys designated as an accredited representative. A request to accredit individuals may be made simultaneously with, or subsequent to, the filing of Form EOIR-31. There is no application form for this purpose. Only a recognized organization may apply for accreditation of a representative – the individual may not submit the application themselves. 8 CFR 292.2(d). The recognized organization may apply for the individual to have full accreditation to represent individuals before the BIA and the Immigration Courts and DHS or apply for partial accreditation to represent individuals only before DHS. To be accredited by the BIA, the individual must be affiliated with a BIA-recognized organization, have experience and knowledge of immigration and naturalization law and procedure, and be of good moral character. The organization must serve a copy of the

Appendix III, continued

application for accreditation of an individual on the offices as noted above. USCIS and ICE have the opportunity to recommend for or against approval of the application, following the same procedure as outlined above for recognition requests.

A grant of accreditation is valid for three years, and may be renewed. The accreditation shall remain valid pending BIA consideration of an application for renewal of accreditation, provided the application is filed at least sixty days prior to the third anniversary of the date of the BIA's prior accreditation of the representative. The validity of a grant of accreditation is also dependent on the accredited representative's continued affiliation with the specific recognized organization that requested the accreditation. Accreditation does not follow the individual should he or she become affiliated with another recognized organization (or different branch of the same recognized organization), nor may the individual continue to provide representation if the recognized organization is no longer in operation, either voluntarily or as the result of a revocation proceeding. 8 CFR 292.2(d). See also Appendix F for relevant BIA precedent decisions.

Per 8 CFR 292.2(e), the BIA maintains a list of all recognized organizations and accredited representatives. This roster is available on the BIA website at http://www.justice.gov/eoir/statspub/raroster.htm and through a link on the USCIS Disciplinary Counsel website.

When USCIS does not participate in the recognition and accreditation process, the BIA makes a decision without input from USCIS or may delay its decision on the application while waiting for a response or recommendation from USCIS. Responding in a timely manner allows USCIS to provide valuable input into the BIA recognition process. Timely and thorough recommendations facilitate the recognition and accreditation processes.

Policy
USCIS district offices will participate in the BIA recognition and accreditation process by providing the BIA in a timely manner with a recommendation to approve or disapprove each applicant for BIA recognition or accreditation.

USCIS District Directors are responsible for filing with the BIA a recommendation for approval or disapproval of the Form EOIR-31 or application for accreditation of representative(s). The recommendation should be based on the application, relevant information within the knowledge of the district staff about the organization applying for recognition and the individual seeking accredited representative status, and any investigation conducted by FDNS or the appropriate USCIS staff in connection with the application(s). An investigation may include a systems check, site visit, or interview, as appropriate. The BIA will evaluate whether fees charged by the organization satisfy the definition of nominal fees; however, USCIS (and ICE) should include an assessment of this issue (and all other relevant issues) in its recommendations. There is no uniform standard for determining whether an applicant meets the "good moral character" requirement. District Directors may make this determination on a case-by-case basis.

Appendix III, continued

PM 602-0039: The Role of USCIS District Directors in the Board of Immigration Appeals Recognition and Accreditation Process; Revisions to the *Adjudicator's Field Manual,* New Chapter 12.6, AFM Update AD 11-34
Page 4

Guidelines for USCIS participation in the BIA recognition and accreditation process are outlined in the Adjudicator's Field Manual (AFM) Chapter 12.6.

Implementation
The AFM is revised as follows:

☞ 1. A new chapter 12.6 is added to read:

Chapter 12.6 Role of USCIS District Directors in the Board of Immigration Appeals Recognition and Accreditation Process

(a) Establishing a Recognition and Accreditation Point-of-Contact (POC) or Team.

(1) Identify a single recognition and accreditation POC or designate several operational staff members in each district office to be part of a recognition and accreditation team to handle these requests.

(2) Each district office should identify a recognition and accreditation POC or team comprised of several operational staff members from its operational staff (e.g., Field Office Director, Community Relations Officer, Fraud Detection and National Security (FDNS) Officer, officer from the Office of Security and Integrity (OSI)) who is most appropriate for that particular office. The recognition and accreditation POC or team should be familiar with the community-based organizations in the district and have worked with local BIA recognized organizations.

Note: To the extent possible, a recognition and accreditation team should include a Community Relations Officer and an FDNS officer.

(b) Ensuring Timely Receipt of Requests for USCIS Recommendation.

(1) Notify field offices that all such requests should be forwarded to the district office.

(2) Expedite mailroom processing to ensure that the recognition and accreditation POC or team receives all Forms EOIR-31 and applications for accreditation of representative(s) well before the response period expires, thirty days after USCIS receives each Form EOIR-31.

(3) Date stamp all Forms EOIR-31 and applications for accreditation of representative(s) on the date they arrive at the district office to ensure that the recognition and accreditation POC or team knows when the 30-day period will expire.

Appendix III, continued

PM 602-0039: The Role of USCIS District Directors in the Board of Immigration Appeals Recognition and Accreditation Process; Revisions to the *Adjudicator's Field Manual,* New Chapter 12.6, AFM Update AD 11-34
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(c) Reviewing Requests for USCIS Recommendation.

(1) Upon receiving a request, if it is unlikely the office will be able to respond within 30 days, the recognition and accreditation POC or team should immediately request an appropriate extension through the BIA Recognition and Accreditation Coordinator so that the BIA is aware that a response from USCIS will be forthcoming. One to two weeks after a request for an extension is submitted, the POC or a team member should contact the BIA Recognition and Accreditation Coordinator to determine whether he or she granted the extension. The program coordinator's telephone number is (703) 305-9029.

(2) The recognition and accreditation POC or team should review the organization or individual's qualifications to provide immigration services.

Note: The USCIS Checklist: Request for BIA Recognition and Accreditation (see **Appendix 12-1**) and the USCIS Worksheet: Requests for Recognition and Accreditation Processing and Procedures (see **Appendix 12-2**) may be used as a resource to help organize requests for recognition and accreditation, but use of the checklist and worksheet is not required.

In evaluating the qualifications of an organization, the team should review relevant information, which may include:

- **Form EOIR-31**;
- Evidence of non-profit status;
- Evidence of what type of services the organization intends to provide;
- Source of the organization's funding;
- Evidence of knowledge, information, and experience in immigration law and procedure;
- Proposed fee structure for services;
- Any additional information, including IBIS checks, review of agency databases including SCCLAIMS, site visits, personal interviews of organization officials, and references; and
- Evidence that the organization or individual is being investigated or prosecuted in a civil or criminal matter for violations relevant to the EOIR-31 (e.g., consumer fraud, unauthorized practice of law, etc.).

In evaluating the qualifications of an individual for whom a recognized organization has filed a request to be accredited as a representative, the recognition and accreditation POC or team should review relevant information, which may include:

- Request for accreditation of representative submitted by recognized organization;
- Letters of recommendation, awards, training certificates, etc.;

Appendix III, continued

- Evidence of experience and knowledge of immigration and naturalization law and procedure;
- Evidence of compensation agreement with the recognized organization;
- Evidence of plan for supervision of accredited representative by recognized organization;
- Any additional information regarding the individual's relationship with the recognized organization, qualifications, and good moral character, including: site visits, personal interviews of organization officials, and references; and
- Evidence that the organization or individual is being investigated or prosecuted in a civil or criminal matter for violations relevant to the request (e.g., consumer fraud, unauthorized practice of law, etc.).

(3) The recognition and accreditation POC or team should seek input from the local ICE office, district Community Relations Officer and the Field Office Director, FDNS officers, supervisory and senior immigration services officers, and USCIS counsel in the jurisdiction where the organization is located.

(4) If the recognition and accreditation POC or team and other USCIS staff are not familiar with the organization or individual, the District or Field Office Director should contact the organization or individual practitioner to assess the strength of the application.

(5) The recognition and accreditation POC or team should conduct checks of media reports, public databases, and other sources to obtain additional information about the organization and individuals seeking accredited representative status.

(6) The recognition and accreditation POC or team should ask FDNS to vet individuals seeking accreditation and any organizations seeking recognition that have not previously been fully vetted through USCIS fraud databases, such as the FDNS data system. If necessary, the POC or team should ask ICE to conduct further background checks.

(7) The recognition and accreditation POC or team should check with the state bar (with the assistance of local USCIS counsel where possible) and other appropriate state agencies, the local FDNS unit, EOIR Disciplinary Counsel (full accreditation requests only), and USCIS Disciplinary Counsel to determine whether there have been any complaints about the organization or individual(s) applying for recognition or accreditation status. The EOIR Office of General Counsel can be contacted at (703) 305-0470.

(d) Responding to Requests for USCIS Recommendation.

(1) If the district office recommends approval, the District Director should submit a letter to the BIA with supporting evidence, if available (see **Appendix 12-3**). A copy

Appendix III, continued

of all documents filed with the BIA must be served on the organization. Personal information identifying customers or stakeholders should be redacted as required by the Privacy Act and DHS policy.

(2) If the district office recommends against approval, a letter should be submitted to the BIA with supporting evidence, if available (see **Appendix 12-4**). Supporting evidence is not required, but may include affidavits or sworn statements by adjudicators, investigators, clients of the applicant representative; criminal history reports; G-28s; investigation results, etc. Note: USCIS may not base a negative recommendation on information that it is unwilling or unable to release to the BIA. A copy of all documents filed with the BIA must be served on the organization. Personal information identifying USCIS officers, customers, or other stakeholders should be redacted as required by the Privacy Act and DHS policy.

(3) The recognition and accreditation POC or team should track all requests for recognition, including the date the Form EOIR-31 is received, due dates for response, date on which a request for additional time in which to submit the recommendation is filed with the BIA, the due date after an extension is granted by the BIA, the date that the recommendation is submitted to the BIA by USCIS or ICE, and the date and disposition by the BIA.

(4) The recognition and accreditation POC or team should retain copies of the all documentation related to the Form EOIR-31 and application(s) for accreditation of representatives.

(e) After Submitting Recommendation to BIA.

The recognition and accreditation POC or team should retain all responses from the BIA, and inform the local USCIS counsel, Field Office Director, and District Director of the BIA decision on all EOIR-31 forms and application(s) for accreditation of representative(s).

(f) Withdrawal of BIA Recognition or Accreditation.

If a USCIS officer believes that an organization's recognition should be revoked, he or she should report the concerns through the supervisory chain of command to the District Director. The District Director has authority to conduct an investigation and, if warranted, may submit a written request to the BIA requesting that the organization's recognition be withdrawn. The filing must include the results of the investigation of the recognized organization. The request must be filed with the BIA recognition and accreditation coordinator and a copy must be served on the organization. An immigration judge will hold a hearing and forward all evidence, along with his or her recommendation, to the BIA. USCIS, ICE, and the organization will have the

Appendix III, continued

opportunity to engage in an oral argument before the BIA, after which the BIA will render a decision.

(g) Summaries of BIA Decisions Relating to the Recognition and Accreditation Process.

Matter of Elly Velez Pamatong (Interim Decision #2743 – November 1979)

- **Summary:** A graduate of the University of Philippines Law Program, who was considered a refugee by the U.N. High Commissioner for Refugees, applied for permission to represent individuals before the Board of Immigration Appeals and the Immigration and Naturalization Service. Notwithstanding the provisions of Article 19 of the Convention and Protocol Relating to the Status of Refugees, his application was denied because he was not an attorney within the meaning of 8 CFR 292.1, or fit under the categories listed in that provision.

- **Full Text of Decision:** http://www.justice.gov/eoir/vll/intdec/vol17/2743.pdf

Matter of American Paralegal Academy, Inc. (Interim Decision #3012 – April 1986)

- **Summary:** Nominal charges are not defined in terms of specific dollar amounts, but have been interpreted to mean a very small quantity or something existing in name only as distinguished from something real or actual. An applicant for BIA recognition, whose charges for services exceed amounts which can be construed as nominal may not rely upon the notion that its fees are substantially less than those charged by law firms, or that its fees are one of the means by which it is able to fund itself.

- **Full Text of Decision:** http://www.justice.gov/eoir/vll/intdec/vol19/3012.pdf

Matter of Lutheran Ministries of Florida (Interim Decision #3132 – February 1990)

- **Summary:** An application for BIA recognition should include detailed information as to how the organization will operate and by whom it will be staffed, as well as other evidence regarding the organization's qualifications, such as resumes for the staff members and information as to the availability of legal resource materials, training programs in immigration law and procedure, and supervised employment for the staff.

- **Full Text of Decision:** http://www.justice.gov/eoir/vll/intdec/vol20/3132.pdf

Matter of Florida Rural Legal Services Inc. (Interim Decision #3196 – February 1993)

- **Summary**: An organization requesting recognition or accreditation of its representatives, which has physically separate offices, must demonstrate by individual application that each office independently has at its disposal adequate knowledge, information, and experience in immigration law and procedure, and that it makes only nominal charges and assesses no excessive membership dues for persons given assistance.

- **Full Text of Decision:** http://www.justice.gov/eoir/vll/intdec/vol20/3196.pdf

Matter of Baptist Educational Center (Interim Decision #3210 – September 1993)

- **Summary**: During proceedings to withdraw an organization's recognized status, if an organization wishes to retain its recognized status, it must demonstrate by clear,

Appendix III, continued

unequivocal, and convincing evidence that it continues to satisfy the requirements for recognition.

- **Full Text of Decision:** http://www.justice.gov/eoir/vll/intdec/vol20/3210.pdf

- ***In re Chaplain Services, Inc.*** (Interim Decision #3292 – July 1996)
  - **Summary:** In an application for recognition, an applicant must respond to and successfully rebut an adverse recommendation made by the district director, even when such recommendation has been made in a prior recognition proceeding involving the applicant. In this case, the applicant's request for recognition was denied because, among others, applicant failed to rebut allegations made by the district director in prior recognition proceedings that the applicant's organization provided clients with misinformation; that the applicant improperly submitted Notices of Entry of Appearance as Attorney or Representative (Forms G-28) on behalf of a purportedly associated attorney who never performed services; that the applicant's clients had been charged excessive amounts for services in spite of the applicant's fee list which reflects nominal charges; and that the member of the applicant's staff upon whose expertise the applicant relies has been the subject of complaints for the unauthorized practice of law.

  - **Full Text of Decision:** http://www.justice.gov/eoir/vll/intdec/vol21/3292.pdf

Matter of EAC Inc., Request for Recognition (Interim Decision #3614 – July 2008)
- **Summary:** The process of recognition is designed to evaluate the qualifications of only those nonprofit organizations that provide knowledgeable legal assistance to low-income aliens in matters involving immigration law and procedure. In order to establish that it has adequate knowledge of immigration law and procedure, an organization seeking recognition must have sufficient access to legal resources, which may include electronic or internet access, as well as resources provided by a law library. An organization seeking recognition must show that it has either a local attorney who is on the staff, offering pro bono services, or providing consultation under a formal arrangement; a fully accredited representative; or a partially accredited representative with access to additional expertise. A recognized organization that does not offer a full range of immigration legal services or whose staff is not sufficiently experienced to handle more complex immigration issues must have the ability to discern when it should direct aliens to seek other legal assistance.

- **Full Text of Decision:** http://www.justice.gov/eoir/vll/intdec/vol24/3614%28recog%29.pdf

Matter of EAC Inc., Request for Accreditation (Interim Decision #3615 – July 2008)
- **Summary:** All accredited representatives on the staff of a recognized organization must have a broad knowledge of immigration law and procedure, even if the organization only intends to provide limited services through one or more partially accredited representatives. In order to show that a proposed accredited representative has the broad knowledge and experience in immigration law and procedure required by 8 CFR § 1292.2(d) (2008), a recognized organization should submit the individual's resume, letters of recommendation, and evidence of immigration training completed, including detailed descriptions of the topics addressed.

- **Full Text of Decision:** http://www.justice.gov/eoir/vll/intdec/vol24/3615%28accred%29.pdf

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☞ 2. Appendix 12-1 is added to read:

[INSERT CHECKLIST HERE]

☞ 3. Appendix 12-2 is added to read:

[INSERT WORKSHEET HERE]

☞ 4. Appendix 12-3 is added to read:

[INSERT APPROVAL LETTER HERE]

☞ 5. Appendix 12-4 is added to read:

[INSERT DENIAL LETTER HERE]

☞ 6. The AFM Transmittal Memoranda button is revised by adding, in numerical order, a new entry to read:

AD 11-34 [06/07/2011]	**Chapter 12.6**, **Appendix 12-1**, **Appendix 12-2**, **Appendix 12-3**, and **Appendix 12-4**	Clarifies the role and responsibilities of USCIS District Directors related to the recognition and accreditation process administered by the Board of Immigration Appeals (BIA), Executive Office for Immigration Review (EOIR), Department of Justice.

Use
This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and should not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information
Questions or suggestions regarding this PM should be addressed through appropriate supervisory channels to the Office of Public Engagement.

Attachment: Form EOIR-31

Appendix IV

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are 8 spearmint oil handlers subject to regulation under the order, and approximately 38 producers of Scotch spearmint oil and approximately 84 producers of Native spearmint oil in the regulated production area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000.

Based on the SBA's definition of small entities, the Committee estimates that two of the eight handlers regulated by the order could be considered small entities. Most of the handlers are large corporations involved in the international trading of essential oils and the products of essential oils. In addition, the Committee estimates that 19 of the 38 Scotch spearmint oil producers and 29 of the 84 Native spearmint oil producers could be classified as small entities under the SBA definition. Thus, a majority of handlers and producers of Far West spearmint oil may not be classified as small entities.

The Far West spearmint oil industry is characterized by producers whose farming operations generally involve more than one commodity, and whose income from farming operations is not exclusively dependent on the production of spearmint oil. A typical spearmint oil-producing operation has enough acreage for rotation such that the total acreage required to produce the crop is about one-third spearmint and two-thirds rotational crops. Thus, the typical spearmint oil producer has to have considerably more acreage than is planted to spearmint during any given season. Crop rotation is an essential cultural practice in the production of spearmint oil for weed, insect, and disease control. To remain economically viable with the added costs associated with spearmint oil production, most spearmint oil-producing farms fall into the SBA category of large businesses.

Small spearmint oil producers generally are not as extensively diversified as larger ones and as such are more at risk to market fluctuations. Such small producers generally need to market their entire annual crop and do not have the luxury of having other crops to cushion seasons with poor spearmint oil returns. Conversely, large diversified producers have the potential to endure one or more seasons of poor spearmint oil markets because income from alternate crops could support the operation for a period of time. Being reasonably assured of a stable price and market provides small producing entities with the ability to maintain proper cash flow and to meet annual expenses. Thus, the market and price stability provided by the order potentially benefit the small producer more than such provisions benefit large producers. Even though a majority of handlers and producers of spearmint oil may not be classified as small entities, the volume control feature of this order has small entity orientation.

This rule continues in effect the action that revised the quantity of Native spearmint oil that handlers may purchase from, or handle on behalf of, producers during the 2010–2011 marketing year, which ends on May 31, 2011. The Native spearmint oil salable quantity and allotment percentage is increased to 1,118,639 pounds and 50 percent, respectively, for the 2010–2011 marketing year.

The use of volume control regulation allows the industry to fully supply spearmint oil markets while avoiding the negative consequences of over-supplying these markets. Volume control is believed to have little or no effect on consumer prices of products containing spearmint oil and likely does not result in fewer retail sales of such products. The marketing order's volume control provisions have been successfully implemented in the domestic spearmint oil industry for nearly three decades and provide benefits for producers, handlers, manufacturers, and consumers.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large spearmint oil handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Further, the Committee's meeting was widely publicized throughout the spearmint industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the November 19, 2010, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue.

Comments on the interim rule were required to be received on or before March 28, 2011. No comments were received. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule, without change. To view the interim rule, go to: *http://www.regulations.gov/#!documentDetail;D=AMS-FV-09-0082-0002*.

This action also affirms information contained in the interim rule concerning Executive Orders 12866 and 12988, the Paperwork Reduction Act (44 U.S.C. Chapter 35), and the E-Gov Act (44 U.S.C. 101).

After consideration of all relevant material presented, it is found that finalizing the interim rule, without change, as published in the **Federal Register** (76 FR 4204, January 25, 2011) will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 985

Marketing agreements, Oils and fats, Reporting and recordkeeping requirements, Spearmint oil.

PART 985—[AMENDED]

■ Accordingly, the interim rule amending 7 CFR part 985 that was published at 76 FR 4204 on January 25, 2011, is adopted as a final rule, without change.

[Note: The affected section of part 985 does not appear in the Code of Federal Regulations.]

Dated: June 6, 2011.

Ellen King,

Acting Administrator,Agricultural Marketing Service.

[FR Doc. 2011–14430 Filed 6–9–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

[Docket No. ICEB–2011–0003]

RIN 1653–ZA03

Employment Authorization for Libyan F–1 Nonimmigrant Students Experiencing Severe Economic Hardship as a Direct Result of Civil Unrest in Libya Since February 2011

AGENCY: U.S. Immigration and Customs Enforcement; DHS.

ACTION: Notice of suspension of applicability of certain requirements.

Appendix IV, continued

SUMMARY: This notice informs the public of the suspension of certain regulatory requirements for F–1 nonimmigrant students whose country of citizenship is Libya and who are experiencing severe economic hardship as a direct result of the civil unrest in Libya since February 2011. The Department of Homeland Security (DHS) is taking action to provide relief to these F–1 students so they may obtain employment authorization, work an increased number of hours while school is in session, and reduce their course load while continuing to maintain their F–1 student status. F–1 students who are granted employment authorization by means of this notice will be deemed to be engaged in a "full course of study" for the duration of their employment authorization, provided that they satisfy the minimum course load requirement described in this notice. This suspension of certain regulatory requirements will automatically terminate on December 31, 2011, without further notice.

DATES: This notice is effective June 10, 2011 and will remain in effect until December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Louis Farrell, Director, Student and Exchange Visitor Program; MS 5600, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., Washington, DC 20536–5600; (703) 603–3400. This is not a toll-free number. Program information can be found at *http://www.ice.gov/sevis/.*

SUPPLEMENTARY INFORMATION:

What action is DHS taking under this notice?

The Secretary of Homeland Security is exercising her authority under 8 CFR 214.2(f)(9) to temporarily suspend the applicability of certain requirements governing on-campus and off-campus employment. F–1 students granted employment authorization by means of this notice will be deemed to be engaged in a "full course of study" for the duration of their employment authorization if they satisfy the minimum course load set forth in this notice. *See* 8 CFR 214.2(f)(6)(i)(F).

Who is covered by this notice?

This notice applies exclusively to F–1 students whose country of citizenship is Libya and who were lawfully present in the United States in F–1 nonimmigrant status on February 1, 2011 under section 101(a)(15)(F)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(F)(i) and (1) are enrolled in an institution that is Student and Exchange Visitor Program (SEVP) certified for enrollment for F–1 students; (2) are currently maintaining F–1 status; and (3) are experiencing severe economic hardship as a direct result of the civil unrest in Libya since February 2011.

This notice applies to both undergraduate and graduate students, as well as elementary school, middle school, and high school students. The notice, however, applies differently to elementary school, middle school, and high school students, as discussed in the question "Does this notice apply to elementary school, middle school, and high school students in F–1 status?"

F–1 students covered by this notice who transfer to other academic institutions that are SEVP-certified for enrollment of F–1 students remain eligible for the relief provided by means of this notice.

Further, this notice regarding employment authorization does not impact other eligibility requirements for Federal Work-Study jobs.

How long will this notice remain in effect?

This notice grants temporary relief until December 31, 2011 to a specific group of F–1 students whose country of citizenship is Libya. DHS will continue to monitor the situation in Libya. Should the special provisions authorized by this notice need to be modified or extended, DHS will announce such changes in the **Federal Register**.

Why is DHS taking this action?

DHS is taking action to provide relief to F–1 students whose country of citizenship is Libya and who are experiencing severe economic hardship as a direct result of the civil unrest in Libya since February 2011. These students may obtain employment authorization, work an increased number of hours while school is in session, and reduce their course load while continuing to maintain their F–1 status.

Since the government crackdown of protests in the east of the country in February, there has been armed conflict in Libya between loyalists of the current government led by Muammar Qadhafi and opposition forces calling for his departure. Approximately 2,000 F–1 students whose country of citizenship is Libya are enrolled in schools in the United States. Given the current conditions in Libya, affected F–1 students whose primary means of financial support comes from the Libyan Government or family members in Libya may now need to be exempt from the normal student employment requirements to be able to continue their studies in the United States and meet basic living expenses. The suspension of all commercial air travel to Libya, violence and uncertainty at land borders, and an overall lack of security, have made it unfeasible for students to safely return to Libya for the foreseeable future. To ameliorate the hardship arising from the lack of financial support and facilitate the students' continued studies, DHS is suspending the applicability of certain requirements governing on-campus and off-campus employment.

What is the minimum course load requirement set forth in this notice?

Undergraduate students who are granted on-campus or off-campus employment authorization under this notice must remain registered for a minimum of six semester/quarter hours of instruction per academic term. Graduate-level F–1 students who are granted on-campus or off-campus employment authorization under this notice must remain registered for a minimum of three semester/quarter hours of instruction per academic term. *See* 8 CFR 214.2(f)(5)(v). In addition, F–1 students (both undergraduate and graduate) granted on-campus or off-campus employment authorization under this notice may count up to the equivalent of one class or three credits per session, term, semester, trimester, or quarter of online or distance education toward satisfying this minimum course load requirement, unless the student's course of study is in a language study program. *See* 8 CFR 214.2(f)(6)(i)(G). Elementary school, middle school, and high school students must maintain "class attendance for not less than the minimum number of hours a week prescribed by the school for normal progress toward graduation," as required under 8 CFR 214.2(f)(6)(i)(E).

May Libyan F–1 students who already have on-campus or off-campus employment authorization benefit from the suspension of regulatory requirements under this notice?

Yes. Libyan F–1 students who already have on-campus or off-campus employment authorization may benefit under this notice, which suspends regulatory requirements relating to the minimum course load requirement under 8 CFR 214.2(f)(6)(i)(A) and (B) and the employment eligibility requirements under 8 CFR 214.2(f)(9) as specified in this notice. Such Libyan F–1 students may benefit without having to apply for a new Form I–766, *Employment Authorization Document* (EAD). To benefit from this notice, the

Appendix IV, continued

student must request that his or her Designated School Official (DSO) enter the following statement in the remarks field of the Student and Exchange Visitor Information System (SEVIS) student record, which will be reflected on the student's Form I–20, Certificate of Eligibility for Nonimmigrant (F–1) Student Status:

> Approved for more than 20 hours per week of [DSO must insert "on-campus" or "off-campus," depending upon the type of employment authorization the student already has] employment authorization and reduced course load under the Special Student Relief authorization from [DSO must insert the beginning date of employment] until [DSO must insert the student's program end date, December 31, 2011, or the current EAD expiration date (if the student is currently working off campus), whichever date comes first].

Must the F–1 student apply for reinstatement after expiration of this special employment authorization if the student reduces his or her full course of study?

No. F–1 students who are granted employment authorization under this notice will be deemed to be engaged in a "full course of study" for the duration of their employment authorization, provided that qualifying undergraduate level F–1 students remain registered for a minimum of six semester/quarter hours of instruction per academic term, and qualifying graduate level F–1 students remain registered for a minimum of three semester/quarter hours of instruction per academic term. *See* 8 CFR 214.2(f)(5)(v) and (f)(6)(i)(F). Such students will not be required to apply for reinstatement under 8 CFR 214.2(f)(16) if they are otherwise maintaining F–1 status.

Will F–2 dependents (spouse or minor children) of F–1 students covered by this notice be eligible to apply for employment authorization?

No. An F–2 spouse or minor child of an F–1 student is not authorized to work in the United States and, therefore, may not accept employment under the F–2 status. *See* 8 CFR 214.2(f)(15)(i).

Will the suspension of the applicability of the standard student employment requirements apply to aliens who are granted an F–1 visa after this notice is published in the Federal Register?

No. The suspension of the applicability of the standard regulatory requirements only applies to those F–1 students whose country of citizenship is Libya and who were lawfully present in the United States in F–1 nonimmigrant status on February 1, 2011 under section 101(a)(15)(F)(i) of the INA, 8 U.S.C. 1101(a)(15)(F)(i) and (1) are enrolled in an institution that is SEVP certified for enrollment of F–1 students; (2) are currently maintaining F–1 status; and (3) are experiencing severe economic hardship as a direct result of the civil unrest in Libya. F–1 students who do not meet these requirements do not qualify for the suspension of the applicability of the standard regulatory requirements, even if they are experiencing severe economic hardship as a direct result of the civil unrest in Libya since February 2011.

Does this notice apply to an F–1 student who departs the United States after this notice is published in the Federal Register and who needs to obtain a new F–1 visa before he or she may return to the United States to continue his or her educational programs?

Yes, provided that the DSO has properly notated the student's SEVIS record, which will then appear on the student's Form I–20. Subject to the specific terms of this notice, the normal rules for visa issuance (including those related to public charge and nonimmigrant intent) remain applicable to nonimmigrants that need to apply for a new F–1 visa in order to continue their educational programs in the United States.

Does this notice apply to elementary school, middle school, and high school students in F–1 status?

This notice does not reduce the required course load for elementary school, middle school, or high school students in F–1 status. Such students must maintain the minimum number of hours of class attendance per week prescribed by the school for normal progress toward graduation. *See* 8 CFR 214.2(f)(6)(i)(E). Eligible F–1 students from Libya enrolled in an elementary school, middle school, or high school do benefit from the suspension of the requirement in 8 CFR 214.2(f)(9)(i) that limits on-campus employment to 20 hours per week while school is in session. DHS notes, however, that the suspension of this requirement is solely for DHS purposes of determining valid F–1 status. Nothing in this notice affects the applicability of federal and state labor laws limiting the employment of minors. With regard to off-campus employment, elementary school, middle school, and high school students benefit from the suspension of the requirement that a student must have been in F–1 status for one full academic year in order to be eligible for off-campus employment and the requirement that limits a student's work authorization to no more than 20 hours per week of off-campus employment while school is in session. With regard to off-campus employment, nothing in this notice affects the applicability of federal and state labor laws limiting the employment of minors. The suspension of certain regulatory requirements related to employment through this notice is applicable to all eligible F–1 students—regardless of educational level—as required by the regulations at 8 CFR 214.2(f)(9)(i) and (f)(9)(ii).

On-Campus Employment Authorization

Will F–1 students who are granted on-campus employment authorization under this notice be authorized to work more than 20 hours per week while school is in session?

Yes. For F–1 students covered in this notice, the Secretary is suspending the applicability of the requirement in 8 CFR 214.2(f)(9)(i) that limits an F–1 student's on-campus employment to 20 hours per week while school is in session. A student whose country of citizenship is Libya and who is experiencing severe economic hardship as result of civil unrest in Libya since February 1, 2011 is authorized to work more than 20 hours per week while school is in session if his or her DSO has entered the following statement in the remarks field of the SEVIS student record, which will be reflected on the student's Form I–20:

> Approved for more than 20 hours per week of on-campus authorization and reduced course load, under the Special Student Relief authorization from [DSO must insert the beginning date of employment] until [DSO must insert the student's program end date or December 31, 2011, whichever date comes first].

To obtain on-campus employment authorization, the student must demonstrate to his or her DSO that the employment is necessary to avoid severe economic hardship that is directly resulting from the civil unrest in Libya. A student authorized by his or her DSO to engage in on-campus employment by means of this notice does not need to make any filing with U.S. Citizenship and Immigration Services (USCIS). The standard rules permitting fulltime work on-campus when school is not in session or during school vacations apply. *See* 8 CFR 214.2(f)(9)(i).

Appendix IV, continued

Will F–1 students who are granted on-campus employment authorization under this notice be authorized to reduce their normal course load and still maintain their F–1 nonimmigrant status?

Yes. F–1 students who are granted on-campus employment authorization under this notice will be deemed to be engaged in a "full course of study" for the purpose of maintaining their F–1 status for the duration of their on-campus employment if they satisfy the minimum course load requirement described in this notice. *See* 8 CFR 214.2(f)(6)(i)(F). However, the authorization for reduced course load is solely for DHS purposes of determining valid F–1 status. Nothing in this notice mandates that a school allow a student to take a reduced course load if the reduction would not meet the school's minimum course load requirement for continued enrollment.[1]

Off-Campus Employment Authorization

What regulatory requirements does this notice temporarily suspend relating to off-campus employment?

For F–1 students covered by this notice, as provided under 8 CFR 214.2(f)(9)(ii)(A), the Secretary is suspending the following regulatory requirements relating to off-campus employment:

(a) The requirement that a student must have been in F–1 status for one full academic year in order to be eligible for off-campus employment;

(b) The requirement that an F–1 student must demonstrate that acceptance of employment will not interfere with the student's carrying a full course of study; and

(c) The requirement that limits a student's work authorization to no more than 20 hours per week of off-campus employment while school is in session.

Will F–1 students who are granted off-campus employment authorization under this notice be authorized to reduce their normal course load and still maintain their F–1 nonimmigrant status?

Yes. F–1 students who are granted employment authorization by means of this notice will be deemed to be engaged in a "full course of study" for purpose of maintaining their F–1 status for the duration of their employment authorization if they satisfy the minimum course load requirement described in this notice. *See* 8 CFR 214.2(f)(6)(i)(F). However, the authorization for reduced course load is solely for DHS purposes of determining valid F–1 status. Nothing in this notice mandates that a school allow a student to take reduced course load if such reduced course load would not meet the school's minimum course load requirement.[2]

How may Libyan F–1 students obtain employment authorization for off-campus employment with a reduced course load under this notice?

F–1 students must file a Form I–765 *Application for Employment Authorization* with USCIS if they wish to apply for off-campus employment authorization based on severe economic hardship resulting from the civil unrest in Libya since February 1, 2011. Filing instructions are located at: *http://www.uscis.gov/i-765.*

Fee considerations. Submission of a Form I–765 currently requires payment of a $340 fee. If the applicant is unable to pay the fee, he or she must submit a written affidavit or unsworn declaration requesting a waiver of the fee and including the statement: "I declare under penalty of perjury that the foregoing is true and correct." *See http://www.uscis.gov/feewaiver.* The submission must include an explanation of why he or she should be granted the fee waiver and the reasons for his or her inability to pay. *See* 8 CFR 103.7(c).

Supporting documentation. An F–1 student seeking off-campus employment authorization due to severe economic hardship must demonstrate to the DSO at the school where the F–1 student is enrolled that this employment is necessary to avoid severe economic hardship and that the hardship is resulting from the civil unrest in Libya since February 1, 2011. If the DSO agrees that the student should receive such employment authorization, he or she must recommend application approval to USCIS by entering the following statement in the remarks field of the student's SEVIS record, which will then appear on the student's Form I–20:

Recommended for off-campus employment authorization in excess of 20 hours per week and reduced course load under the Special Student Relief authorization from the date of the USCIS authorization noted on Form I–766 until [DSO must insert the program end date or December 31, 2011, whichever date comes first].

The student must then file the properly endorsed Form I–20 and Form I–765, according to the instructions for the Form I–765. The student may begin working off campus only upon receipt of the EAD from USCIS.

DSO recommendation. In making a recommendation that a student be approved for Special Student Relief, the DSO certifies that:

(a) The student is in good academic standing as determined by the DSO;

(b) The student is a citizen of Libya and is experiencing severe economic hardship as a direct result of the civil unrest in Libya since February 1, 2011, as documented on the Form I–20;

(c) The student is carrying a full course of study at the time of the request for employment authorization;

(d) The student will be registered for the duration of his or her authorized employment for a minimum of six semester or quarter hours of instruction per academic term if the student is at the undergraduate level, or for a minimum of three semester or quarter hours of instruction per academic term if the student is at the graduate level; and

(e) The off-campus employment is necessary to alleviate severe economic hardship to the individual caused by the civil unrest in Libya since February 1, 2011.

Processing. To facilitate prompt adjudication of the student's application for off-campus employment authorization under 8 CFR 214.2(f)(9)(ii)(C), the student should:

(a) Ensure that the application package includes: (1) A completed Form I–765; (2) the required fee or properly documented fee waiver request as defined in 8 CFR 103.7(c); and (3) a signed and dated copy of the student's Form I–20 with the appropriate DSO recommendation, as previously described in this notice; and

(b) send the application in an envelope which is clearly marked on the front of the envelope, bottom right-hand side, with the phrase "SPECIAL STUDENT RELIEF." Failure to include this notation may result in significant processing delays. If USCIS approves the student's Form I–765, the USCIS official will send the student a Form I–766 EAD as evidence of his or her employment authorization. The EAD will contain an expiration date that does not exceed the student's program end date.

Paperwork Reduction Act

An F–1 student seeking off-campus employment authorization due to severe

[1] Minimum course load requirement for enrollment in a school must be established in a publicly available document (*e.g.,* catalog, Web site, or operating procedure), and it must be a standard applicable to all students (U.S. citizens and foreign students) enrolled at the school.

[2] Minimum course load requirement for enrollment in a school must be established in a publicly available document (*e.g.,* catalog, Web site, or operating procedure), and it must be a standard applicable to all students (U.S. citizens and foreign students) enrolled at the school.

Appendix IV, continued

economic hardship must demonstrate to the DSO at the school where he or she is enrolled that this employment is necessary to avoid severe economic hardship. If the DSO agrees that the student should receive such employment authorization, he or she must recommend application approval to USCIS by entering information in the remarks field of the student's SEVIS record. The authority to collect this information is currently contained in the SEVIS collection of information currently approved by OMB under OMB Control Number 1653–0038.

This notice also allows F–1 students whose country of citizenship is Libya and who are experiencing severe economic hardship as a direct result of civil unrest in Libya since February 1, 2011, to obtain employment authorization, work an increased number of hours while school is in session, and reduce their course load, while continuing to maintain their F–1 student status.

To apply for work authorization an F–1 student must complete and submit currently approved Form I–765 according to the instructions on the form. The authority to collect the information contained on the current Form I–765 has previously been approved by the Office of Management and Budget under the Paperwork Reduction Act (PRA) (OMB Control No. 1615–0040). Although there will be a slight increase in the number of Form I–765 filings because of this notice, the number of filings currently contained in the OMB annual inventory for Form I–765 is sufficient to cover the additional filings. Accordingly, there is no further action required under the PRA.

Janet Napolitano,

Secretary.

[FR Doc. 2011–14482 Filed 6–9–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 307, 381, and 590

[Docket No. FSIS–2010–0014]

RIN [0583–AD35]

Changes to the Schedule of Operations Regulations

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service (FSIS) is amending the meat, poultry products, and egg products regulations pertaining to the schedule of operations. FSIS is amending these regulations to define the 8-hour work day as including time that inspection program personnel need to spend at the workplace donning and doffing required gear, time spent walking to their workstations after donning required gear, and time spent walking from their work stations prior to doffing required gear.

DATES: Effective July 11, 2011.

FOR FURTHER INFORMATION CONTACT: Daniel L. Engeljohn, Assistant Administrator, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250–3700, *telephone:* (202) 205–0495.

SUPPLEMENTARY INFORMATION:

Background

The Federal Meat Inspection Act (FMIA), 21 U.S.C. 601 *et seq.,* and the Poultry Products Inspection Act (PPIA), 21 U.S.C. 451 *et seq.,* provide for mandatory Federal inspection of livestock and poultry slaughtered at official establishments and of meat and poultry products processed at official establishments. The Egg Products Inspection Act (EPIA), 21 U.S.C. 1031 *et seq.,* provides for mandatory inspection of egg products processed at official plants. FSIS bears the cost of mandatory inspection provided during non-overtime and non-holiday hours of operation. Official establishments and egg products plants pay for inspection services performed on holidays or on an overtime basis.

On August 9, 2010, FSIS proposed to amend its regulations pertaining to the schedule of operations. FSIS proposed to define the 8-hour work day as including time that inspection program personnel need to spend at the workplace donning and doffing required gear, time spent walking to their workstations after donning required gear, and time spent walking from their work stations prior to doffing required gear. As explained in the preamble to the proposed rule, FSIS proposed the amendments to administer its inspection program in accord with the Supreme Court's holding in *IBP, Inc.* v. *Alvarez,* 546 U.S. 21 (2005), and policy guidance from the Office of Personnel Management (OPM).

Specifically, the preamble to the proposed rule explained that this regulatory change is necessary in light of the Supreme Court's ruling that the Fair Labor Standards Act (FLSA) covers (1) any activity that is integral and indispensable to a principal activity; and (2) during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity. *IBP,* 546 U.S. at 37. The preamble to the proposed rule also briefly addressed OPM's treatment of the *de minimis* exception, codified at 5 CFR 551.412(a), and an OPM letter to the National Treasury Employees Union discussing that regulation. Finally, the preamble to the proposed rule described a settlement reached between FSIS and the National Joint Council of Food Inspectors regarding inspector compensation for donning and doffing activities.

Comments and FSIS Responses

FSIS received 20 comments on the proposed rule from the public, industry, and trade organizations. FSIS also received a letter concerning the proposal from the Department of Labor. Commenters generally supported that FSIS inspection program personnel should be fully compensated for work. However, commenters had varying opinions regarding the Agency's interpretation of *IBP,* the distinction between unique and non-unique gear, and application of the *de minimis* rule; and questions about how FSIS will implement the rule.

Unique Versus Non-Unique Gear and the Application of De Minimis

Several comments addressed the Agency's treatment of *IBP, Inc.* v. *Alvarez,* 546 U.S. 21 (2005), as it relates to the distinction between unique and non-unique gear and application of the *de minimis* rule. The two comments discussed in detail below were reflective of all comments related to this topic. "Unique" gear refers to items that are unique to the jobs at issue, such as cut-resistant gloves and chain link metal aprons in livestock slaughter establishments. "Non-unique" gear refers to generic items, such as hardhats, and hairnets, worn in all slaughter and processing establishments.

The first comment, submitted by the Department of Labor (DOL), argued that whether gear worn by employees is unique or non-unique is irrelevant to whether donning and doffing the gear is a principal, compensable activity. DOL stated that the preamble to the proposed rule incorrectly implied that *IBP* only dealt with unique protective gear. Rather, DOL stated that the two lower court cases that were consolidated by the Supreme Court in *IBP* in fact dealt with both unique and non-unique gear, and that the Supreme Court treated all items interchangeably, without regard to

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the certification basis of the airplane, and the approval must specifically refer to this AD. An alternative method of compliance that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings.

Maintenance Program Revision

(j) Before or concurrently with doing the actions required by paragraph (g) of this AD, or within 30 days after the effective date of this AD, whichever occurs later: Revise the maintenance program by incorporating airworthiness limitations (AWL) No. 28–AWL–18 and 28–AWL–19 in Section D of Section 9 ("AIRWORTHINESS LIMITATIONS–FUEL SYSTEMS") of the Boeing 727–100/200 Airworthiness Limitations (AWLs) Document, D6–8766–AWL, Revision August 2010. The initial compliance time for AWL No. 28–AWL–18 is within 10 years after the accomplishment of paragraph (g) of this AD, or within 10 years after the effective date of this AD, whichever occurs later.

No Alternative Inspections, Inspection Intervals, or Critical Design Configuration Control Limitations (CDCCLs)

(k) After accomplishing the action specified in paragraph (j) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used unless the inspections, intervals, or CDCCLs are approved as an alternative method of compliance in accordance with the procedures specified in paragraph (l) of this AD.

Alternative Methods of Compliance (AMOCs)

(l)(1) The Manager, Seattle ACO, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes ODA that has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Related Information

(m) For more information about this AD, contact Louis Natsiopoulos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: 425–917–6478; fax: 425–917–6590; e-mail: *elias.natsiopoulos@faa.gov.*

Material Incorporated by Reference

(n) You must use Boeing Service Bulletin 727–28–0131, dated August 18, 2010; and Section 9 of the Boeing 727–100/200 Airworthiness Limitations (AWLs) Section 9, Document D6–8766–AWL, Revision August 2010; to do the actions required by this AD, unless the AD specifies otherwise. "Section 9" is referenced only in the List of Effective Pages section of the Boeing 727–100/200 AWLs Document.

(1) The Director of the Federal Register approved the incorporation by reference of the service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at an NARA facility, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on May 11, 2011.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–13652 Filed 6–9–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF STATE

22 CFR Part 62

[Public Notice 7500]

RIN 1400–ZA20

Exchange Visitor Program

AGENCY: Department of State.

ACTION: Notice of suspension of applicability of certain requirements.

SUMMARY: The Department is temporarily suspending the application of certain requirements governing program status and on-campus and off-campus employment for J–1 Libyan students. This action is necessary to mitigate the adverse impact upon these students due to political turmoil in their home country.

DATES: This action is effective June 10, 2011, and will remain in effect until December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Nicole Deaner, Senior Advisor, Private Sector Exchange, 2200 C Street NW., SA–5, 5th Floor, Washington, DC 20522; e-mail *JExchanges@state.gov.*

SUPPLEMENTARY INFORMATION: Recent political turmoil in Libya has affected Exchange Visitor Program college and university students studying in the United States. Many of the students dependent upon financial support originating in their home country have found themselves without funds. To ameliorate the hardship arising from this lack of financial support and facilitate these students' continued studies, the Department is suspending the application of the full course of study requirement set forth at 22 CFR 62.23(e), the application of the requirements governing student employment set forth at 22 CFR 62.23(g), and the application of the duration of participation requirements set forth at 22 CFR 62.23(h) effective June 10, 2011 until December 31, 2011. The temporary suspension of certain requirements governing program status and on-campus and off-campus employment for J–1 Libyan students does not apply to Federal Work-Study jobs.

College and university students in J–1 status whose means of financial support come from Libya and whose financial support has been disrupted, reduced, or eliminated due to turmoil in their home country may be authorized by the Responsible Officer of their academic institution to pursue full-time or part-time on-campus or off-campus employment. A reduction in the students' academic course load may also be necessary due to this employment and accordingly, such students will be deemed to be in valid J–1 Exchange Visitor Program student status if they are (i) an undergraduate student and enrolled for not less than six semester hours of academic credit or its recognized equivalent; (ii) a graduate student enrolled for not less than three hours of academic credit or its recognized equivalent; (iii) a non-degree student actively participating on not less than a half-time equivalent basis in the prescribed course of study for which the student was initially authorized J–1 student status; or (iv) a non-degree student actively pursuing English language instruction on not less than a half-time equivalent basis.

Responsible officers who authorize on-campus or off-campus employment for these students should update the

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students' SEVIS record by notating in the remarks box of their electronic record: "Special Student Relief work authorization granted until December 31, 2011." If a reduced course load is also authorized due to employment, the responsible officer should also record this fact in the SEVIS record comment box as: "reduced course load authorized."

The Department's suspension of the application of the requirements set forth in 22 CFR 62.23(e), 22 CFR 62.23(g) and 22 CFR 62.23(h) for these identified students will remain in effect until December 31, 2011.

Dated: June 6, 2011.

Joseph A. Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2011–14499 Filed 6–9–11; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9528]

RIN 1545–BH32

Alternative Simplified Credit Under Section 41(c)(5)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to the election and calculation of the alternative simplified credit under section 41(c)(5) of the Internal Revenue Code (Code). The final regulations affect certain taxpayers claiming the credit under section 41. These final regulations implement changes to the credit for increasing research activities under section 41 made by the Tax Relief and Health Care Act of 2006.

DATES: *Effective Date:* These regulations are effective on June 9, 2011.

Applicability Date: For dates of applicability, see §§ 1.41–6(j)(3), 1.41–8(b)(5), and 1.41–9(d).

FOR FURTHER INFORMATION CONTACT: David Selig (202) 622–3040 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On June 17, 2008, the Treasury Department and the IRS published final and temporary regulations (TD 9401) in the **Federal Register** (73 FR 34185) relating to the election and calculation of the alternative simplified credit (ASC) under section 41(c)(5). The ASC was added by the Tax Relief and Health Care Act of 2006 (Public Law 109–432, 120 Stat. 2922, December 20, 2006). A notice of proposed rulemaking cross-referencing the temporary regulations was also published in the same issue of the **Federal Register** (73 FR 34237). Written and electronic comments responding to these regulations (collectively, the 2008 regulations) were received and a public hearing was held on the 2008 regulations on September 25, 2008. After consideration of the comments received and the statements made at the public hearing, the 2008 regulations are adopted as revised by this Treasury decision.

Summary of Comments and Explanation of Changes

The 2008 regulations were issued primarily to provide guidance on the election and calculation of the ASC. Section 1.41–9T(b) of the 2008 regulations provide that an election to make or revoke the provisions of the ASC under section 41(c)(5) must be made on a timely filed (including extensions) original return for the taxable year and may not be made on an amended return. Before the issuance of the 2008 regulations, identical election procedures existed for the alternative incremental research credit (AIRC) under § 1.41–8. The 2008 regulations extended these election procedures to the ASC under § 1.41–9T. The 2008 regulations also provided that extensions of time to make or revoke the election for both the AIRC and the ASC will not be granted under § 301.9100–3. In the case of the AIRC, the 2008 regulations are of limited duration as section 41(h)(2) provides that no election under section 41(c)(4) shall apply to taxable years beginning after December 31, 2008.

Commenters stated that these provisions of the 2008 regulations are restrictive and asked that they be excluded from the final regulations.

The Treasury Department and the IRS believe that both tax administration and fairness are best served by adopting the same election procedures for the ASC that are used for the AIRC under § 1.41–8. A taxpayer may make or revoke an election each taxable year by obtaining the consent of the Commissioner. A taxpayer is deemed to have requested, and to have been granted, the consent of the Commissioner to make or revoke an election if the taxpayer completes the portion of Form 6765, "Credit for Increasing Research Activities," (or successor form) relating to the credit determined under section 41(a)(1), the AIRC, or the ASC, as appropriate, and attaches the completed form to the taxpayer's timely filed (including extensions) original return for the year to which it applies. As is the case with a revocation of an AIRC election under § 1.41–8, an ASC election under section 41(c)(5) may not be made or revoked on an amended return. Consistent with this position, the final regulations also provide that an extension of time to make or revoke an election under sections 41(c)(4) and 41(c)(5) will not be granted under § 301.9100–3.

One commenter suggested changing the ASC short taxable year rules in the 2008 regulations to prorate short years by the number of days in the year instead of the number of months in the year. The Treasury Department and the IRS agree that calculating the ASC for short taxable years on a daily rather than a monthly basis provides a more accurate calculation and removes uncertainty as to whether and how to include a partial month in making the monthly calculation. Accordingly, the final regulations generally require that short taxable years be prorated by the number of days in the year instead of the number of months in the year for taxable years ending after June 9, 2011. Recognizing that some taxpayers may have already filed returns using a monthly calculation for a short taxable year, the final regulations also provide that returns filed for taxable years ending within a specified time period may, at the taxpayer's option, be amended to reflect the daily calculation.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. Although a substantial number of small entities may make an election under these regulations, any economic impact is minimal. This certification is based upon the fact that the information required by these regulations is already required to be maintained under the statute and current regulations. These regulations add little or no new burden to the existing requirements. Additionally, an election under these regulations generally will simplify the calculation of the credit and may result

Appendix VI

OFFICE OF THE GENERAL COUNSEL
Division of Operations Management

MEMORANDUM OM 11-62 June 7, 2011

TO: All Regional Directors, Officers in Charge, and Resident Officers,

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings

This memorandum provides a brief introduction to immigration status issues, and an update regarding how such issues should be addressed during NLRB investigations and proceedings. The NLRA protects all employees covered by the Act regardless of immigration status;[1] however, immigration status issues may affect remedies and occasionally present other practical difficulties for the enforcement of the Act. Supplementing GC 02-06, this memorandum provides further guidance for proceeding when immigration status issues arise during NLRB case handling. It also identifies immigration agencies that have discretion to provide immigration remedies and other assistance to discriminatees or witnesses in Board proceedings. Regions should contact DAGC Peter Sung Ohr in the Division of Operations-Management whenever issues arise that may require assistance from such immigration agencies as further described below.

A. Background

1. Immigration Agencies

Since the organization of the Department of Homeland Security ("DHS") in 2002, primary responsibility for immigration issues has been split between three agencies within DHS:

- United States Citizenship and Immigration Services ("**USCIS**") is responsible for adjudicating immigration benefits, such as visas;
- Immigration and Customs Enforcement ("**ICE**") investigates immigration violations and enforces the law, including the prosecution of removal actions before immigration judges within the Department of Justice;
- Customs and Border Patrol ("**CBP**") is responsible for securing the physical borders and points of entry.

Within the limits of the law, USCIS, ICE, and CBP have discretion to decide whether, when, and how to enforce the law in each particular case coming within their respective jurisdictions. See Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 483-87 (1999). In

[1] Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984); see Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 152 (2002) (expressly reaffirming this principle, though limiting remedies in order to avoid conflict with immigration law).

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exercising this discretion, immigration agencies will consider, among other things, "[c]urrent or past cooperation [by the individual] with . . . law enforcement authorities, such as the U.S. Attorneys, the Department of Labor, or National Labor Relations Board, among others." Memorandum, "Exercising Prosecutorial Discretion," Commissioner of Immigration and Naturalization Services Doris Meissner, p. 8 (November 17, 2000); see also Memorandum, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," Assistant Secretary of Immigrations and Customs Enforcement John Morton p. 4 (June 30, 2010); OM Memo 97-11 "Relations with Immigration and Naturalization Service (INS) of the U.S. Department of Justice" (February 14, 1997).

2. Immigration Status

Non-citizens[2] may hold one of two general categories of lawful visa status:

- **Immigrant visas** confer status as a Lawful Permanent Resident, colloquially referred to as a "green card." Lawful Permanent Residents generally have work authorization. This status does not expire but can be terminated in a variety of circumstances, including certain criminal convictions.
- **Nonimmigrant visas** are temporary and will expire within a specific defined term. There are many varied types of nonimmigrant visas, most often named after the statutory subsection in the Immigration and Nationality Act ("INA"), which creates each specific type. INA, Pub. L. 82-414, as amended, see 8 U.S.C. § 1101, et seq. For example, the "H-2B visa" refers to the temporary worker visa governed by INA § 101(a)(15)(H)(ii)(b), (see below). The scope and nature of work authorization varies considerably among the nonimmigrant visas:
  - **No work authorization** is provided by many of the most common nonimmigrant visa types, including B-1 visas for business, B-2 visas for tourists and short term visitors covered by the visa waiver program (visitors from, for example, Japan, Czech Republic, Italy, England, etc.).
  - **Limited work authorization** is provided by a number of visas, particularly those obtained through work (rather than family or asylum). Such work authorization is limited to a specific employer; indeed, the visa itself is terminated if the employment relationship ends, and the former employee is then required by law to leave the country. Visas of this sort include H-1 visas for professionals, H-2B visas for nonprofessionals, and L visas for intracompany transferees.
  - **Broader work authorization** that permits working for any employer is provided by some visas, including portions of the term of some student visas, K-1 fiancée visas, and T, U, and S,[3] law enforcement visas (described more fully below).

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[2] "All persons born or naturalized in the United States" are citizens under the Fourteenth Amendment. Citizens generally do not encounter immigration status issues when working in the United States.

[3] The S visa was created in 1994 as a temporary program and made permanent in 2001 require certification by the Attorney General and are capped at 200 visas per year. They are available only for informants against criminal organizations or enterprises. 8 U.S.C. § 1101(a)(15)(S)(i). An additional 50 visas are available where the Secretary of State and the Attorney General provide certification for a reliable informant on terrorist organizations. 8 U.S.C. § 1101(a)(15)(S)(ii); 8 U.S.C. § 1184(k)(1).

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Violations of visa terms—either by working when unauthorized or by "overstaying" after the expiration of a visa—can result in loss of visa status and removal from the country. In addition, entering the country without any valid immigration status violates immigration law and can result in removal; such persons are commonly referred to as "**undocumented.**"

B. Procedure for Addressing Immigration Status Issues

As noted, the NLRA protects covered employees regardless of immigration status. Therefore, immigration status (or lack thereof) is generally not relevant either in representation proceedings or at the merits stage of unfair labor practice proceedings. As stated, in GC 02-06, "Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc." p. 6:

- Regions generally should presume that employees are lawfully authorized to work. They should refrain from conducting a *sua sponte* immigration investigation and should object to questions concerning the discriminatee's immigration status at the merits stage.
- Regions should investigate the discriminatee's immigration status only after a respondent establishes the existence of a genuine issue [during the remedial stage].
- Regions should conduct an investigation by asking the Union, the charging party and/or the discriminatee to respond to the employer's evidence.

Regions should continue to follow this policy and consult GC 02-06 for additional direction.

Nonetheless, immigration issues are sometimes unavoidably interjected into NLRB proceedings. For example, NLRB discriminatees, witnesses, or voting-eligible employees may be taken into custody by ICE or CBP. In addition, immigration status may be inextricably intertwined with an unfair labor practice, such as where immigration threats or related conduct is the basis of the unfair labor practice allegation. Finally, the issue may be as simple as an employee volunteering information about immigration status or asking the Region for immigration advice or assistance.

Regions should not provide immigration advice. Resolution of these issues is best addressed when employees can obtain immigration advice through their union or from an independent immigration attorney. Regions may refer interested persons to the list of accredited immigration services providers maintained by the Department of Justice and found at http://www.justice.gov/eoir/statspub/raroster.htm.[4] Individuals sometimes are mistaken about their immigration status and Regions should not assume that immigration status information volunteered by an unrepresented person is correct.

C. Seeking Assistance from Immigration Agencies Regarding Status Issues

As set forth below, in certain cases where immigration status is of particular significance, the Agency may decide to seek the assistance of one of the three immigration agencies to advance

[4] As a public service, the Region could place copies of the listing of currently recognized organizations and accredited individuals in a binder in a designated area in the Regional office for the public's use.

Appendix VI, continued

the effective enforcement of the NLRA. Such agencies might assist in providing visa remedies, deferring immigration actions during the pendency of the NLRB proceeding, and/or releasing individuals from custody or providing access to witnesses in custody. Regions should consult with DAGC Peter Sung Ohr in the Division of Operations-Management when such issues arise.

Regions should also discuss with the Division of Operations-Management cases involving any of the following circumstances: 1) where the status of an individual involved in the case is lost, particularly because of protected concerted activities; 2) where the individual's presence in the country is important to the effectuation of the Act; 3) where NLRB or immigration processes are being abused by the employer; and/or 4) where the employer knew or was willfully ignorant of the employee's lack of status. These circumstances are merely illustrative and there may be others where consulting with the Division of Operations-Management would be prudent.

1. Loss of Status, Particularly Where Status is Lost Because of Protected Concerted Activities

Cases involving lawful immigration status that is illegally stripped from an employee as a direct result of an unfair labor practice are very compelling. For example, as previously noted, an employee holding a nonimmigrant work visa—such as the H or L visas—will be dependent upon continued employment by a specific employer in order to maintain immigration status and legally remain in the country. An employer who fired such an employee in violation of, for example, Section 8(a)(1) or 8(a)(3), also would have unlawfully deprived the employee of visa status. In addition, the investigation, prosecution, and remediation of the unfair labor practice would likely be impeded by the discriminatee's absence from the country. However, remaining in the country to pursue the unfair labor practice could subject the discriminatee to immigration penalties and could complicate remedial considerations—even though the employee had always complied with immigration law and has been illegally deprived of immigration status.

In addition, cases where individuals lost lawful immigration status for any of a variety of other reasons may also require assistance from immigration agencies in order to remain in the country to participate in NLRB proceedings. This category includes those cases where there is simply the expiration of a temporary nonimmigrant visa.

2. Importance of the Individual's Presence in the Country to the Effectuation of the Act

Immigration status issues may interfere with enforcement and effectuation of the NLRA by, for example, impacting the availability of discriminatees and important witnesses during NLRB proceedings. In such cases, it may be appropriate to seek the assistance of immigration agencies.

In addition, particular attention is required where the alleged ULP involves egregious conduct, such as physical coercion, involuntary servitude, blackmail, or violations of other laws. Examples of physical coercion and involuntary servitude may include taking an employee's passport or imposing illegal working conditions. Examples of blackmail may include interfering with protected activity through illegal threats of retaliation such as threats to call immigration authorities or threats to "blacklist" employees. In such cases, additional immigration remedies

Appendix VI, continued

may be available, including a law enforcement visa such as the U or T Visa.[5] It is very important that Regions contact the Division of Operations-Management when such issues arise.

T Visas:

The T Visa category was created in 2000 by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386. This visa is available where the applicant is the victim of "severe forms of trafficking in persons,"[6] and the victim must be present in the United States because of the trafficking. 8 U.S.C. § 1101(a)(15)(T)(i)(II). The victim must have either "complied with any reasonable request for assistance in the investigation or prosecution of acts of such trafficking in persons, or [i]s less than 15 years of age." 8 U.S.C. § 1101(a)(15)(T)(i)(III). Additionally, the victim must also prove "extreme hardship involving unusual and severe harm" if the victim were deported. 8 C.F.R. § 214.11(i) (describing evidentiary standard for extreme hardship). There is also a numerical limit of 5000 T Visas per year.

T Visas last for a term of three years, and automatically include work authorization. 8 C.F.R. § 214.11(l)(4)(work authorization); § 214.11(p)(three year term). Family members of victims can also obtain T Visas; family member T Visas are not subject to the numerical cap. 8 C.F.R. § 214.11(o). T Visas also include a path to becoming a lawful permanent resident. 8 C.F.R. § 214.11(p)(2).

This visa could be applicable in some cases that come before the NLRB. For example, where a discriminatee is brought into the country under false pretenses and confined in sweatshop conditions, a T Visa may be available. However, in most cases, T Visas may not be available either because the individual came to the United States independent of any trafficking, or the circumstances do not rise to the level of severe trafficking required by USCIS.

In those cases where a T Visa may be applicable, the Regional Office should immediately contact DAGC Peter Sung Ohr in the Division of Operations-Management.

U Visa:

Like the T Visa, the U Visa category was created by the Victims of Trafficking and Violence Protection Act. The U Visa is available where the nonimmigrant applicant is the victim of one the following "qualifying crimes" while in the United States:

> rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion;

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[5] Such visas are available to the victims of certain qualifying crimes who are cooperating with law enforcement agencies. 8 U.S.C. § 1101(a)(15)(T) & (U); 8 C.F.R. § 214.14.

[6] Defined as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." 8 C.F.R. § 214.11(a).

Appendix VI, continued

> manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

8 U.S.C. 1101(a)(15)(U)(iii).

Applicants for U Visas must submit a completed Form I-918, "Petition for U Nonimmigrant Status" to USCIS for consideration, along with a completed and certified Supplement B form completed by an agency responsible "for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity." See 8 C.F.R. § 214.14(c)(2)(i); Instructions for I-918, Supplement B at 2. In completing Supplement B, the agency must certify that the individual submitting the Form I-918 is a victim of certain qualifying criminal activity and is, has been, or is likely to be helpful in the investigation or prosecution of that activity. See 8 C.F.R. § 214.14(c)(2).

USCIS has interpreted this list of U Visa qualifying crimes broadly, and stated in the relevant regulatory documents that this is a list "of general categories of criminal activity. It is also a non-exclusive list. Any similar activity to the activities listed may be a qualifying criminal activity." New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, Interim Final Rule, 72 F.R. 53014, 53018 (September 17, 2007).

If a Regional Office receives a request to complete the Supplemental B form to certify a U Visa application, the Region should immediately contact DAGC Peter Sung Ohr in the Division of Operations-Management. Initially, it will be the Regional Office's responsibility to investigate whether the nonimmigrant applicant has been a victim of a qualifying criminal activity and is being, has been, or is likely to be helpful to the investigation of that activity. The qualifying criminal activity must be related to the meritorious unfair labor practice alleged in the ULP under investigation by the NLRB.

Upon the conclusion of the Regional investigation, the Region should submit a written recommendation to the Division of Operations-Management addressing whether the ULP allegation is related to the qualified criminal activity within the meaning of the U Visa statute and whether the nonimmigrant applicant has demonstrated that he or she has been, is being, or is likely to be helpful to the investigation.

The U Visa should be applicable in a greater number of cases than the T Visa because of the breadth of the crimes which qualify. The list includes a number of crimes that may arise in the workplace, and which also constitute unfair labor practices in some cases, including "peonage; involuntary servitude; . . . unlawful criminal restraint; false imprisonment; blackmail; extortion; . . . felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes."

The remedy provided by the U Visa are substantially similar to those available with the T Visa: a term of generally three or four years (USCIS may extend the term beyond four aggregate years), work authorization, family member visas, and a path to becoming a lawful permanent resident. 8 C.F.R. § 214.14(g), (c)(6), (f), (g)(2), respectively.

Appendix VI, continued

3. Abuse of Process: Retaliation Using Immigration Status

Whether or not a T or U Visa may be available to an individual involved in a Board proceeding, Regions should contact the Division of Operations-Management in cases where an employer is taking advantage of immigration status issues in an attempt to abuse the NLRB process and thwart the effective enforcement of the law. Examples of this type of behavior include calling or threatening to call ICE in retaliation for protected concerted activities, citing immigration status as a pretext for unlawful firing, and alluding to immigration status in a menacing or suggestive way during representation or ULP proceedings.[7]

4. Employer Knowledge or Willful Ignorance of Individuals Undocumented Status

Regions should also contact the Division of Operations-Management in cases where a respondent employer commits ULPs against an employee knowing or with willful ignorance of such employee's lack of immigration work authorization. Such employers pose a significant threat to the enforcement of the NLRA because they deliberately take advantage of the employee's lack of status. In most such cases, the employees are aware or suspect that the employer knows of their immigration status, and are thus deterred from exercising their legal rights even where no overt immigration threats are made.

The kind of evidence that demonstrates that an employer knew or was willfully ignorant of the workers' status includes: failure to ask for I-9 documents,[8] complicity in accepting fraudulent I-9 documents, and irregular pay arrangements. Threats to take action based on status or other statements acknowledging employees' status also reflect a knowing or willfully ignorant Employer.[9]

Conclusion

Although Regions should not raise immigration status issues *sua sponte*, in cases where such issues arise, immigration agencies may grant immigration remedies or favorably exercise discretion in order to assist the NLRB in the enforcement of the NLRA. Regions should contact DAGC Peter Sung Ohr in the Division of Operations-Management in all cases where the circumstances arguably justify using these mechanisms.

/s/
R.A.S.

cc: NLRBU
Released to the Public

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[7] Generally, an employer may raise immigration status during remedial ULP proceedings as a defense to back pay and reinstatement. GC 02-06; see Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002); NLRB v. Domsey Trading Corp., __ F.3d __, 10-3356, 2011 WL 563688 (2d Cir. February 18, 2011) ("[W]e find that employers may cross-examine backpay applicants with regard to their immigration status, and leave it to the Board to fashion evidentiary rules consistent with Hoffman.").

[8] Acceptable documents to establish a worker's identity and eligibility to work in the United States.

[9] Seeking such information should be done consistent with the guidelines in GC 02-06.

Appendix VII

Country Reciprocity Schedule

Curacao Reciprocity Schedule

Visa Classification	Fee	Number of Applications	Validity Period
A-1	None	Multiple	60 Months
A-2	None	Multiple	60 Months
A-3 [1]	None	Multiple	12 Months
B-1	None	Multiple	120 Months
B-2	None	Multiple	120 Months
B-1/B-2	None	Multiple	120 Months
C-1	None	Multiple	60 Months
C-1/D	None	Multiple	60 Months
C-2	None	Multiple	12 Months
C-3	None	Multiple	60 Months
D	None	Multiple	60 Months
E-1 [2]	None	Multiple	60 Months
E-2 [2]	None	Multiple	60 Months
F-1	None	Multiple	60 Months
F-2	None	Multiple	60 Months

Appendix VII, continued

G-1	None	Multiple	60 Months
G-2	None	Multiple	60 Months
G-3	None	Multiple	60 Months
G-4	None	Multiple	60 Months
G-5 [1]	None	Multiple	12 Months
H-1B	None	Multiple	60 Months [3]
H-1C	None	Multiple	60 Months [3]
H-2A	None	Multiple	60 Months [3]
H-2B	None	Multiple	60 Months [3]
H-2R	None	Multiple	60 Months [3]
H-3	None	Multiple	60 Months [3]
H-4	None	Multiple	60 Months [3]
I	None	Multiple	60 Months
J-1 [4]	None	Multiple	60 Months
J-2 [4]	None	Multiple	60 Months
K-1	None	One	6 Months
K-2	None	One	6 Months
K-3	None	Multiple	24 Months
K-4	None	Multiple	24 Months
L-1	None	Multiple	60 Months [3]
L-2	None	Multiple	60 Months [3]
M-1	None	Multiple	60 Months

Appendix VII, continued

M-2	None	Multiple	60 Months
N-8	None	Multiple	60 Months
N-9	None	Multiple	60 Months
NATO 1-7	N/A	N/A	N/A
O-1	None	Multiple	60 Months [3]
O-2	None	Multiple	60 Months [3]
O-3	None	Multiple	60 Months [3]
P-1	None	Multiple	60 Months [3]
P-2	None	Multiple	60 Months [3]
P-3	None	Multiple	60 Months [3]
P-4	None	Multiple	60 Months [3]
Q-1 [6]	None	Multiple	15 Months [3]
R-1	None	Multiple	60 Months
R-2	None	Multiple	60 Months
S-5 [7]	None	One	1 Month
S-6 [7]	None	One	1 Month
S-7 [7]	None	One	1 Month
T-1 [9]	N/A	N/A	N/A
T-2	None	One	6 Months
T-3	None	One	6 Months
T-4	None	One	6 Months
T-5	None	One	6 Months

Appendix VII, continued

TD [5]	N/A	N/A	N/A
U-1	None	Multiple	48 Months
U-2	None	Multiple	48 Months
U-3	None	Multiple	48 Months
U-4	None	Multiple	48 Months
U-5	None	Multiple	48 Months
V-1	None	Multiple	120 Months
V-2	None	Multiple	120 Months [8]
V-3	None	Multiple	120 Months [8]

Documents

Information coming soon!

Visa Category Footnotes

1. The validity of A-3, G-5, and NATO 7 visas may not exceed the validity of the visa issued to the person who is employing the applicant. The "employer" would have one of the following visa classifications:

   - A-1
   - A-2
   - G-1 through G-4
   - NATO 1 through NATO 6
2. An E-1 and E-2 visa may be issued only to a principal alien who is a national of a country having a treaty, or its equivalent, with the United States. E-1 and E-2 visas may not be issued to a principal alien if he/she is a stateless resident. If the spouse and children of an E-1 or E-2 principal alien are stateless, or if they are nationals of a country which does not have a treaty with the United States, they may be accorded derivative E-1 or E-2 status. In these cases, the reciprocity schedule of the principal alien's nationality is used.

   Example: John Doe is a national of the country of Z that has an E-1/E-2 treaty with the U.S. His wife and child are nationals of the country of Y which has no treaty with the U.S. The wife and child would, therefore, be entitled to derivative status and receive the same

Appendix VII, continued

reciprocity as Mr. Doe, the principal visa holder.

3. The validity of H-1 through H-3, L-1, O-1 and O-2, P-1 through P-3, and Q visas may not exceed the period of validity of the approved petition or the number of months shown, whichever is less.

   Derivative H-4, L-2, O-3, and P-4 visas, issued to accompanying or following-to-join spouses and children, may not exceed the validity of the visa issued to the principal alien.

4. There is no reciprocity fee for the issuance of a J visa if the alien is a United States Government grantee or a participant in an exchange program sponsored by the United States Government.

   Also, there is no reciprocity fee for visa issuance to an accompanying or following-to-join spouse or child (J-2) of an exchange visitor grantee or participant.

   In addition, an applicant is eligible for an exemption from the MRV fee if he or she is participating in a State Department, USAID, or other federally funded educational and cultural exchange program (program serial numbers G-1, G-2, G-3 and G-7).

   However, all other applicants with U.S. Government sponsorships, including other J-visa applicants, are subject to the MRV processing fee.

5. Under the North American Free Trade Agreement (NAFTA), Canadian and Mexican nationals coming to engage in certain types of professional employment in the United States may be admitted in a special nonimmigrant category known as the "trade NAFTA" or "TN" category. Their dependents (spouse and children) accompanying or following to join them may be admitted in the "trade dependent" or "TD" category whether or not they possess Canadian or Mexican nationality. Except as noted below, the number of entries, fees and validity for non-Canadian or non-Mexican family members of a TN status holder seeking TD visas should be based on the reciprocity schedule of the TN principal alien.

Canadian Nationals

Since Canadian nationals generally are exempt from visa requirement, a Canadian "TN' or "TD" alien does not require a visa to enter the United States. However, the non-Canadian national dependent of a Canadian "TN", unless otherwise exempt from the visa requirement, must obtain a "TD" visa before attempting to enter the United States. The standard reciprocity fee and validity period for all non-Canadian "TD"s is no fee, issued for multiple entries for a period of 36 months, or for the duration of the principal alien's visa and/or authorized period of stay, whichever is less. See 'NOTE' under Canadian reciprocity schedule regarding applicants of Iranian, Iraqi or Libyan nationality.

Mexican Nationals

Mexican nationals are not visa-exempt. Therefore, all Mexican "TN"s and both Mexican and

Appendix VII, continued

non-Mexican national "TD"s accompanying or following to join them who are not otherwise exempt from the visa requirement (e.g., the Canadian spouse of a Mexican national "TN") must obtain nonimmigrant visas.

Applicants of Iranian, Iraqi or Libyan nationality, who have a permanent resident or refugee status in Canada/Mexico, may not be accorded Canadian/Mexican reciprocity, even when applying in Canada/Mexico. The reciprocity fee and period for "TD" applicants from Libya is $10.00 for one entry over a period of 3 months. The Iranian and Iraqi "TD" is no fee with one entry over a period of 3 months.

6. Q-2 (principal) and Q-3 (dependent) visa categories are in existence as a result of the 'Irish Peace Process Cultural and Training Program Act of 1998'. However, because the Department anticipates that virtually all applicants for this special program will be either Irish or U.K. nationals, the Q-2 and Q-3 categories have been placed only in the reciprocity schedules for those two countries. Q-2 and Q-3 visas are available only at the Embassy in Dublin and the Consulate General in Belfast.

7. No S visa may be issued without first obtaining the Department's authorization.

8. V-2 and V-3 status is limited to persons who have not yet attained their 21st birthday. Accordingly, the period of validity of a V-2 or V-3 visa must be limited to expire on or before the applicant's twenty-first birthday.

9. Posts may not issue a T-1 visa. A T-1 applicant must be physically present in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands or a U.S. port of entry, where he/she will apply for an adjustment of status to that of a T-1. The following dependents of a T-1 visa holder, however, may be issued a T visa at a U.S. consular office abroad:

    - T-2 (spouse)
    - T-3 (child)
    - T-4 (parent)

10. The validity of NATO-5 visas may not exceed the period of validity of the employment contract or 12 months, whichever is less.

Appendix VIII

Country Reciprocity Schedule

Sint Maarten Reciprocity Schedule

Visa Classification	Fee	Number of Applications	Validity Period
A-1	None	Multiple	60 Months
A-2	None	Multiple	60 Months
A-3 [1]	None	Multiple	12 Months
B-1	None	Multiple	120 Months
B-2	None	Multiple	120 Months
B-1/B-2	None	Multiple	120 Months
C-1	None	Multiple	60 Months
C-1/D	None	Multiple	60 Months
C-2	None	Multiple	12 Months
C-3	None	Multiple	60 Months
D	None	Multiple	60 Months
E-1 [2]	None	Multiple	60 Months
E-2 [2]	None	Multiple	60 Months
F-1	None	Multiple	60 Months
F-2	None	Multiple	60 Months

Appendix VIII, continued

G-1	None	Multiple	60 Months
G-2	None	Multiple	60 Months
G-3	None	Multiple	60 Months
G-4	None	Multiple	60 Months
G-5 [1]	None	Multiple	12 Months
H-1B	None	Multiple	60 Months [3]
H-1C	None	Multiple	60 Months [3]
H-2A	None	Multiple	60 Months [3]
H-2B	None	Multiple	60 Months [3]
H-2R	None	Multiple	60 Months [3]
H-3	None	Multiple	60 Months [3]
H-4	None	Multiple	60 Months [3]
I	None	Multiple	60 Months
J-1 [4]	None	Multiple	60 Months
J-2 [4]	None	Multiple	60 Months
K-1	None	One	6 Months
K-2	None	One	6 Months
K-3	None	Multiple	24 Months
K-4	None	Multiple	24 Months
L-1	None	Multiple	60 Months [3]
L-2	None	Multiple	60 Months [3]
M-1	None	Multiple	60 Months

Appendix VIII, continued

M-2	None	Multiple	60 Months
N-8	None	Multiple	60 Months
N-9	None	Multiple	60 Months
NATO 1-7	N/A	N/A	N/A
O-1	None	Multiple	60 Months [3]
O-2	None	Multiple	60 Months [3]
O-3	None	Multiple	60 Months [3]
P-1	None	Multiple	60 Months [3]
P-2	None	Multiple	60 Months [3]
P-3	None	Multiple	60 Months [3]
P-4	None	Multiple	60 Months [3]
Q-1 [6]	None	Multiple	15 Months [3]
R-1	None	Multiple	60 Months
R-2	None	Multiple	60 Months
S-5 [7]	None	One	1 Month
S-6 [7]	None	One	1 Month
S-7 [7]	None	One	1 Month
T-1 [9]	N/A	N/A	N/A
T-2	None	One	6 Months
T-3	None	One	6 Months
T-4	None	One	6 Months
TD [5]	N/A	N/A	N/A

Appendix VIII, continued

U-1	None	Multiple	48 Months
U-2	None	Multiple	48 Months
U-3	None	Multiple	48 Months
U-4	None	Multiple	48 Months
U-5	None	Multiple	48 Months
V-1	None	Multiple	120 Months
V-2	None	Multiple	120 Months [8]
V-3	None	Multiple	120 Months [8]

Documents

Information coming soon!

Visa Issuing Posts

Caracas, Venezuela (Embassy)

Bridgetown, Barbados (Embassy)

Visa Services

The U.S. Embassy at Bridgetown, Barbados processes immigrant and nonimmigrant visas for nationals of the island of Sint Maarten.

Visa Category Footnotes

1. The validity of A-3, G-5, and NATO 7 visas may not exceed the validity of the visa issued to the person who is employing the applicant. The "employer" would have one of the following visa classifications:
    - A-1
    - A-2
    - G-1 through G-4
    - NATO 1 through NATO 6
2. An E-1 and E-2 visa may be issued only to a principal alien who is a national of a country

Appendix VIII, continued

having a treaty, or its equivalent, with the United States. E-1 and E-2 visas may not be issued to a principal alien if he/she is a stateless resident. If the spouse and children of an E-1 or E-2 principal alien are stateless, or if they are nationals of a country which does not have a treaty with the United States, they may be accorded derivative E-1 or E-2 status. In these cases, the reciprocity schedule of the principal alien's nationality is used.

Example: John Doe is a national of the country of Z that has an E-1/E-2 treaty with the U.S. His wife and child are nationals of the country of Y which has no treaty with the U.S. The wife and child would, therefore, be entitled to derivative status and receive the same reciprocity as Mr. Doe, the principal visa holder.

3. The validity of H-1 through H-3, L-1, O-1 and O-2, P-1 through P-3, and Q visas may not exceed the period of validity of the approved petition or the number of months shown, whichever is less.

   Derivative H-4, L-2, O-3, and P-4 visas, issued to accompanying or following-to-join spouses and children, may not exceed the validity of the visa issued to the principal alien.

4. There is no reciprocity fee for the issuance of a J visa if the alien is a United States Government grantee or a participant in an exchange program sponsored by the United States Government.

   Also, there is no reciprocity fee for visa issuance to an accompanying or following-to-join spouse or child (J-2) of an exchange visitor grantee or participant.

   In addition, an applicant is eligible for an exemption from the MRV fee if he or she is participating in a State Department, USAID, or other federally funded educational and cultural exchange program (program serial numbers G-1, G-2, G-3 and G-7).

   However, all other applicants with U.S. Government sponsorships, including other J-visa applicants, are subject to the MRV processing fee.

5. Under the North American Free Trade Agreement (NAFTA), Canadian and Mexican nationals coming to engage in certain types of professional employment in the United States may be admitted in a special nonimmigrant category known as the "trade NAFTA" or "TN" category. Their dependents (spouse and children) accompanying or following to join them may be admitted in the "trade dependent" or "TD" category whether or not they possess Canadian or Mexican nationality. Except as noted below, the number of entries, fees and validity for non-Canadian or non-Mexican family members of a TN status holder seeking TD visas should be based on the reciprocity schedule of the TN principal alien.

Canadian Nationals

Since Canadian nationals generally are exempt from visa requirement, a Canadian "TN' or "TD" alien does not require a visa to enter the United States. However, the non-Canadian national dependent of a Canadian "TN", unless otherwise exempt from the visa

Appendix VIII, continued

requirement, must obtain a "TD" visa before attempting to enter the United States. The standard reciprocity fee and validity period for all non-Canadian "TD"s is no fee, issued for multiple entries for a period of 36 months, or for the duration of the principal alien's visa and/or authorized period of stay, whichever is less. See 'NOTE' under Canadian reciprocity schedule regarding applicants of Iranian, Iraqi or Libyan nationality.

Mexican Nationals

Mexican nationals are not visa-exempt. Therefore, all Mexican "TN"s and both Mexican and non-Mexican national "TD"s accompanying or following to join them who are not otherwise exempt from the visa requirement (e.g., the Canadian spouse of a Mexican national "TN") must obtain nonimmigrant visas.

Applicants of Iranian, Iraqi or Libyan nationality, who have a permanent resident or refugee status in Canada/Mexico, may not be accorded Canadian/Mexican reciprocity, even when applying in Canada/Mexico. The reciprocity fee and period for "TD" applicants from Libya is $10.00 for one entry over a period of 3 months. The Iranian and Iraqi "TD" is no fee with one entry over a period of 3 months.

6. Q-2 (principal) and Q-3 (dependent) visa categories are in existence as a result of the 'Irish Peace Process Cultural and Training Program Act of 1998'. However, because the Department anticipates that virtually all applicants for this special program will be either Irish or U.K. nationals, the Q-2 and Q-3 categories have been placed only in the reciprocity schedules for those two countries. Q-2 and Q-3 visas are available only at the Embassy in Dublin and the Consulate General in Belfast.

7. No S visa may be issued without first obtaining the Department's authorization.

8. V-2 and V-3 status is limited to persons who have not yet attained their 21st birthday. Accordingly, the period of validity of a V-2 or V-3 visa must be limited to expire on or before the applicant's twenty-first birthday.

9. Posts may not issue a T-1 visa. A T-1 applicant must be physically present in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands or a U.S. port of entry, where he/she will apply for an adjustment of status to that of a T-1. The following dependents of a T-1 visa holder, however, may be issued a T visa at a U.S. consular office abroad:

    - T-2 (spouse)
    - T-3 (child)
    - T-4 (parent)

10. The validity of NATO-5 visas may not exceed the period of validity of the employment contract or 12 months, whichever is less.

Appendix IX

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

Published Privacy Impact Assessments on the Web

AGENCY: Privacy Office, DHS.

ACTION: Notice of Publication of Privacy Impact Assessments (PIA).

SUMMARY: The Privacy Office of the DHS is making available sixteen PIAs on various programs and systems in the Department. These assessments were approved and published on the Privacy Office's web site between January 8, 2011 and March 31, 2011.

DATES: The PIAs will be available on the DHS Web site until July 26, 2011, after which they may be obtained by contacting the DHS Privacy Office (contact information below).

FOR FURTHER INFORMATION CONTACT: Mary Ellen Callahan, Chief Privacy Officer, Department of Homeland Security, Washington, DC 20528, or e-mail: *pia@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION: Between January 8, 2011 and March 31, 2011, the Chief Privacy Officer of the DHS approved and published sixteen Privacy Impact Assessments (PIAs) on the DHS Privacy Office Web site, *http://www.dhs.gov/privacy,* under the link for ''Privacy Impact Assessments.'' These PIAs cover sixteen separate DHS programs. Below is a short summary of those programs, indicating the DHS component responsible for the system, and the date on which the PIA was approved. Additional information can be found on the Web site or by contacting the Privacy Office.

System: DHS/ICE/PIA–005(b) Bond Management Information System (BMIS) Web Release 2.2 Update.

Component: U.S. Immigration and Customs Enforcement (ICE).

Date of approval: January 19, 2011.

Bond Management Information System (BMIS) is an immigration bond management database used primarily by the Office of Financial Management at U.S. ICE. The basic function of BMIS is to support the financial management of immigration bonds posted for the release of aliens in ICE custody. Among other things, ICE uses BMIS to calculate and pay interest to obligors who post cash immigration bonds. Under Internal Revenue Service rules, interest payments to certain obligors are subject to backup withholdings where a percentage of the payment is withheld as tax and sent to the IRS. To begin to implement the backup withholding rules, ICE is modifying BMIS to collect additional information about obligors to determine whether a backup withholding is required. Because ICE is expanding the scope of information collected and the purposes for which BMIS information is being used, an update to the BMIS PIA is required.

System: DHS/TSA/PIA–059 TSA Advanced Imaging Technology (AIT) Update.

Component: Transportation Security Administration (TSA).

Date of approval: January 25, 2011.

TSA has deployed AIT, including backscatter x-ray and millimeter wave devices, for operational use to detect threat objects carried on persons entering airport sterile areas. AIT creates an image of the full body that highlights objects that are on the body. To mitigate the privacy risk associated with creating an image of the individual's body, TSA isolates the TSA officer (the image operator) viewing the image from the TSA officer interacting with the individual. TSA does not store any personally identifiable information from AIT screening. A PIA on the pilot was published on January 2, 2008, updated on October 17, 2008 and updated again on July 23, 2009 as program developments warranted.

TSA plans to test, and implement as appropriate, Automatic Target Recognition software for AIT machines that display anomalies on a generic figure, as opposed to displaying the image of a specific individual's body. Since the technology uses a generic image that provides greater privacy protections for the individual being screened, systems using Automatic Target Recognition will not isolate the operator viewing the image from the individual being screened. Individuals will continue to be given the option of undergoing a physical screening as an alternative to AIT screening.

System: DHS/USCIS/PIA–034 H–1B Visa Cap Registration Notice of Proposed Rule Making (NPRM).

Component: U.S. Citizenship and Immigration Services (USCIS).

Date of approval: January 28, 2011.

USCIS is proposing to amend its regulation governing petitions by U.S. employers seeking H–1B nonimmigrant worker status for aliens subject to annual numerical limitations or exempt from numerical limitations by having earned a U.S. master's or higher degree (also referred to as the ''65,000 cap'' and ''20,000 cap'' respectively, or the ''cap'' collectively). Under the proposed rule, USCIS would establish H–1B Cap Registration, a mandatory registration process, to streamline the administration of H–1B petitions filed by employers. This PIA is being conducted because the H–1B Cap Registration NPRM proposes a change to USCIS' collection of PII.

System: DHS/OPS/PIA–009 National Operations Center (NOC) Tracker and Senior Watch Officer Logs.

Component: Office of Operations Coordination and Planning (OPS).

Date of approval: February 3, 2011.

NOC in the Office of Operations Coordination and Planning (OPS) operates the NOC Tracker Log and the Senior Watch Officer (SWO) Log. The SWO Log is a synopsis of all significant information received and actions taken during a shift by the SWO. The NOC Tracker Log is a repository of all NOC responses to threats or incidents and significant activities that require a NOC tracking number. OPS has conducted this PIA because both the SWO Log and NOC Tracker Log may contain PII associated with an administrative note or a watch desk Request for Information.

System: DHS/USCIS/PIA–035 Migrant Information Tracking System.

Component: U.S. Citizenship and Immigration Services (USCIS).

Date of approval: February 3, 2011.

USCIS developed the Migrant Information Tracking System (MITS) to serve as a centralized repository for information relating to migrants interdicted at sea. MITS facilitates USCIS' ability to record and track information pertaining to a migrant's illicit maritime migration into the United States and respond to information requests regarding interdicted migrants from Members of Congress inquiring on behalf of a family member of the migrant. USCIS conducted this PIA because MITS collects, uses, and disseminates PII.

System: DHS/ALL/PIA–034 Medical Credentials Management System.

Component: Office of Health Affairs (OHA).

Date of approval: February 10, 2011.

DHS Office of Health Affairs (OHA) is instituting a centralized medical credentialing system for DHS employees that provide health care services as part of their job and the Components' mission or incidental to their ongoing operations. The purpose of the program is to formalize a process for verifying DHS employee and/or applicant qualifications, licensure information, and relevant health care provider data. In accordance with the DHS Directive 248–01, Medical Quality Management, the Assistant Secretary for Health Affairs and Chief Medical Officer (ASHA/CMO) is responsible for developing a centralized credentials management system for approving credentials for DHS employee medical care providers. The credentialing

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process will include the collection of and maintenance of information related to professional education, state license number(s), national registry certification, board certification, training and other pertinent information related to medical care practices. OHA conducted this PIA because the medical credentials management system will collect and maintain PII on DHS medical care providers.

System: DHS/USCG/PIA–015 Merchant Mariner Licensing and Documentation System (MMLD).

Component: United States Coast Guard.

Date of approval: March 1, 2011.

USCG owns and operates the MMLD System. The USCG uses MMLD to manage the issuance of credentials to Merchant Mariners and process merchant mariner applications; to produce merchant mariner credentials; to track the who of merchant mariner credentials issued by the USCG; to track the status of merchant mariners with respect to service, training, credentials, and qualifications, related to the operation of commercial vessels; to qualify merchant mariners for benefits and services administered by other agencies; and to perform merchant mariner call-ups related to national security. The records include the credential, background check, and medical status on each U.S. Mariner and World War II Merchant Mariner Veteran. USCG has conducted this PIA because MMLD collects and uses PII.

System: DHS/S&T/PIA–021 Cell All Demonstration.

Component: Science and Technology (S&T).

Date of approval: March 2, 2011.

The Cell All project is a research, development, testing and evaluation effort funded by the Homeland Security Advanced Research Projects Agency in the DHS S&T Directorate. Cell All is an environmental surveillance system that uses a typical cell phone as a platform for a sensor system to detect harmful chemical substances and transmit critical information, including location data, to first responder and other related monitoring agencies. With the sensors suite developed and fitted on a cell phone, S&T will conduct a demonstration of the prototype system using research-owned devices. While no PII will be collected during the demonstration, S&T is conducting a PIA to address the privacy impact of the transmission of location data using the prototype.

System: DHS/ALL/PIA–035 Nebraska Avenue Complex CCTV System.

Component: Management.

Date of approval: March 2, 2011.

The DHS, Office of the Chief Security Officer (OCSO), Physical Access Security Division (PHYSD) operates the Physical Access Control System (PACS). PACS is designed to coordinate access control, intrusion detection, and video surveillance at DHS Headquarters (HQ) facilities in the National Capital Region (NCR), primarily the Nebraska Avenue Complex (NAC). This PIA will focus exclusively on the video surveillance function within PACS known as the Closed-Circuit Television (CCTV) system at the NAC. The OCSO has conducted this PIA to analyze PII that the video surveillance function within PACS collects, uses, and maintains.

The NAC CCTV system is a video-only recording system installed at NAC. The NAC CCTV system does not have audio recording capability. The purpose of the system is to enable OCSO PHYSD and its Force Protection Branch personnel, including security guards, the ability to obtain current state visual information as well as information on or related to a security-related incident that is happening or has happened and to deter criminal activities.

System: DHS/USCIS/PIA–036 E–Verify Self Check Service.

Component: USCIS.

Date of approval: March 3, 2011.

USCIS Verification Division has developed a new service called E–Verify Self Check. The E–Verify Self Check service is voluntary and available to any individual who wants to check his own work authorization status prior to employment and facilitate correction of potential errors in federal databases that provide inputs into the E–Verify process. When an individual uses the E–Verify Self Check service he will be notified that either (1) his information matched the information contained in federal databases and would be deemed work-authorized, or (2) his information was not matched to information contained in federal databases which would be considered a ''mismatch.'' If the information was a mismatch, he will be given instructions on where and how to correct his records. USCIS conducted this PIA because E–Verify Self Check will collect and use PII.

System: DHS/ALL/PIA–036 DHS-wide Use of Unidirectional Social Media Applications Communications and Outreach.

Component: DHS Wide.

Date of approval: March 8, 2011.

Unidirectional social media applications encompass a range of applications, often referred to as applets or widgets that allow users to view relevant, real-time content from predetermined sources. DHS or Department intends to use unidirectional social media tools including desktop widgets, mobile apps, podcasts, audio and video streams, Short Message Service texting, and Really Simple Syndication feeds, among others, for external relations (communications and outreach) and to disseminate timely content to the public about DHS initiatives, public safety, and other official activities and one-way notifications. These dynamic communication tools broaden the Department's ability to disseminate content and provide the public multiple channels to receive and view content. The public will continue to have the option of obtaining comparable content and services through the Department's official Web sites and other official means. This PIA analyzes the Department's use of unidirectional social media applications. This PIA does not cover users sending content to the Department. Additionally, this PIA will describe the PII and the extremely limited circumstances under which the Department will have access to PII, how it will use the PII, what PII is retained and shared, and how individuals can gain access to their PII. Appendix A of this PIA will serve as a listing, to be updated periodically, of DHS unidirectional social media applications, approved by the Chief Privacy Officer, that follow the requirements and analytical understanding outlined in this PIA. The unidirectional social media applications listed in Appendix A are subject to Privacy Compliance Reviews by the DHS Privacy Office.

System: DHS/ALL/PIA–037 SharePoint.

Component: DHS Wide.

Date of approval: March 22, 2011.

DHS is developing SharePoint as a Service (SharePoint), which will be an enterprise offering available to all organizations within the Department. This platform will serve as an enterprise collaboration and communication solution, eliminating additional investments in duplicative collaborative technologies, leveraging economies of scale, and connecting separate organizations through the use of the same platform in an integrated environment. DHS is conducting this PIA because PII may be collected and stored in the SharePoint environment. This PIA sets out the minimum standard for SharePoint privacy and security requirements; DHS components may build more detailed controls and technical enhancements into their respective sites.

System: DHS/ALL/PIA038 Integrated Security Management System (ISMS).

Component: Office of Security.

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Date of approval: March 23, 2011.

ISMS is a web-based case management tool designed to support the lifecycle of DHS personnel security, administrative security, and classified visit management programs. Classified visit management is an administrative process in which an individual's security clearance information is exchanged between agencies to document an individual's security clearance level. Personnel security records maintained in ISMS include suitability and security clearance investigations which contain information related to background checks, investigations, and access determinations. For administrative security and classified visit management ISMS contains records associated with security container/document tracking, classified contract administration, and incoming and outgoing classified visitor tracking. The system is a DHS enterprise-wide application that replaces the Personnel Security Activities Management System, which was decommissioned on May 31, 2010.

System: DHS/ICE/PIA–026 Federal Financial Management System (FFMS).

Component: ICE.

Date of approval: March 23, 2011.

FFMS is a web-based, workflow management and financial transaction system that provides core financial management functions for ICE and five other components within DHS: USCIS, S&T, the National Protection Programs Directorate (NPPD), Office of Health Affairs (OHA), and DHS Office of Management (MGMT). FFMS is used to create and maintain a record of each allocation, commitment, obligation, travel advance and accounts receivable issued. The system contains personally identifiable information (PII) about DHS employees, contractors/vendors, customers and members of the public that participate in DHS programs. ICE is conducting this PIA because FFMS collects and maintains PII. This PIA focuses on ICE's collection and use of PII, and each component will publish appendices to this PIA as required to describe their collection and use of PII in FFMS.

System: DHS/ICE/PIA–027 ICE Subpoena System.

Component: ICE.

Date of approval: March 29, 2011.

The ICE Subpoena System (ISS) is owned and operated by the Office of Homeland Security Investigations (HSI) within U.S. ICE, a component of the DHS. ISS automates the process of generating, logging, and tracking subpoenas and summonses that ICE issues in furtherance of its investigations into violations of customs and immigration laws. It also supports the generation of Form I–9 notices, which notify employers that ICE intends to inspect their records to determine if they have completed the required employment eligibility forms for their employees. ICE is conducting this PIA because ISS contains PII about the individuals to whom these subpoenas, summonses, and notices are directed as well as the individuals who are the subjects of these legal process documents.

System: DHS/MGMT/PIA–005 Foreign National Visitor Management System (FNVMS).

Component: Office of Security.

Date of approval: March 30, 2011.

FNVMS, a module hosted on the DHS ISMS information technology platform, is a risk assessment tool that provides the DHS with an application to log, track, and review non-U.S. Persons (foreign nationals) who visit or perform work at DHS facilities.

Dated: May 18, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2011–0255]

Notification of the Imposition of Conditions of Entry for Certain Vessels Arriving to the United States From the Union of the Comoros and the Republic of Cote d'Ivoire

AGENCY: Coast Guard, DHS.

ACTION: Notice.

SUMMARY: The Coast Guard announces that it will impose conditions of entry on vessels arriving from the countries of the Union of the Comoros and the Republic of Cote d'Ivoire.

DATES: The policy announced in this notice will become effective June 10, 2011.

ADDRESSES: This notice is part of docket USCG–2011–0255 and is available online by going to *http://www.regulations.gov,* inserting USCG–2011–0255 in the ''Keyword'' box, and then clicking ''Search.'' The material is also available for inspection and copying at the Docket Management Facility at the U.S. Department of Transportation, Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329. This policy is also available at *http://www.homeport.uscg.mil* under the Maritime Security tab; International Port Security Program (ISPS Code); Port Security Advisory link.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call Mr. Michael Brown, International Port Security Evaluation Division, United States Coast Guard, telephone 202—372–1081. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826 or (toll free) 1–800–647–5527.

SUPPLEMENTARY INFORMATION:

Background and Purpose

Section 70110 of title 46, United States Code, enacted as part of section 102(a) of the Maritime Transportation Security Act of 2002 (Pub. L. 107–295, Nov. 25, 2002) authorizes the Secretary of Homeland Security to impose conditions of entry on vessels requesting entry into the United States arriving from ports that are not maintaining effective anti-terrorism measures. It also requires public notice of the ineffective anti-terrorism measures. The Secretary has delegated to the Coast Guard authority to carry out the provisions of this section. See Department of Homeland Security Delegation No. 0170.1, sec. 97. Previous notices have imposed or removed conditions of entry on vessels arriving from certain countries, and those conditions of entry and the countries they pertain to remain in effect unless modified by this notice.

The Coast Guard has determined that ports in the Union of the Comoros and the Republic of Cote d'Ivoire are not maintaining effective anti-terrorism measures. To make these determinations, the Coast Guard International Port Security (IPS) Program conducted an initial visit to the Union of the Comoros in November 2009, and conducted an initial visit to the Republic of Cote d'Ivoire in January 2010. In our investigations of both countries, significant deficiencies were found in the legal regime, designated authority oversight, access control, and cargo control. In September 2010, the Deputy Commandant for Operations made findings that effective anti-terrorism measures were not in place in the ports of Comoros and Cote d'Ivoire. Inclusive to these determinations is an assessment that the Union of the