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At A Glance

In the closing weeks of its 1994 session, Congress made it possible (though more expensive) for thousands of immigrant visa applicants living in the United States to adjust their status here, without having to travel abroad to complete the visa process. This major development in immigration law came on the heels of a flurry of immigration-related activity in the Congress, in the courts, and by the INS. The most salient results of this activity are summarized in this article, which discusses:

- adjustment of status
- the immigration-related provisions of the Violent Crime Control and Law Enforcement Act of 1994, including protections for abused immigrant women and children
- work authorization for asylum applicants, and other developments in asylum law
- Immigration and Nationality Act section 212(c) waivers of deportation
- INS abuses in enforcement, including civil document fraud and Fourth Amendment violations
- immigrants' access to public benefits, including disaster relief from the Federal Emergency Management Agency, housing, general assistance, welfare and health care.

Immigrants' rights advocates expect that in 1995 federal and local lawmakers will renew their efforts to trim or eliminate immigrants' access not only to basic social and health services, but also to asylum and the other avenues by which persons immigrate to the United States.

Immigrants' Rights Issues in 1994

By the National Immigration Law Center

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I. Immigration Law Issues

A. Significant Legislation

1. Adjustment of Status

The most significant development in immigration law occurred at the end of the1994 Congressional session with the passage of a statutory amendment eliminating the requirement that immigrant visa applicants return to their home countries to complete the visa process. /1/ The new law, which took effect on Oct. 1, 1994, will sunset on Oct. 1, 1997. Prior to this amendment, the majority of immigrant visa applicants could not adjust their status in the United States, and were required instead to apply at the U.S. consulate in their home country. For example, persons who entered the country illegally, overstayed their nonimmigrant visas, or worked here illegally, were generally precluded from adjusting their status in the U.S., with some important exceptions. The amendment eliminates that statutory bar, at least for the next three years.

However, the amended law also imposes additional burdens. Persons previously ineligible for adjustment of status now have to choose between adjusting in the United States and paying an additional fee (a sum equivalent to five times the adjustment application fee) or, by electing consular processing, remaining outside the United States for 90 days. Two groups of persons are exempt from the increased fee: children under age 17, and persons who qualify and applied for Family Unity status. /2/ For those electing consular processing, the amended law bars persons who have been physically present in the United States from receiving an immigrant visa within 90 days of leaving the United States, unless they fall within two exceptions by either maintaining a lawful nonimmigrant visa at the time of they departed the United States, or by qualifying for and making an application for Family Unity status. Most immigrant visa applicants will probably take advantage of the chance to adjust in the United States and pay the increased fee rather than return to their home country, wait 90 days, and risk being stranded there should a visa be denied.

2. The Violent Crime Control and Law Enforcement Act of 1994

The other major piece of legislation affecting immigrants was the Violent Crime Control and Law Enforcement Act (the Crime Bill) /3/, signed into law on Sept. 13, 1994, which increases penalties for alien smuggling, makes it easier to deport aggravated felons, and, most importantly, contains a

provision protecting abused immigrant spouses and children. Other provisions in the law may assist U.S. law enforcement officials in carrying out their immigration-related duties more effectively.

An important provision in the Crime Bill allows spouses and children who have been battered or subjected to "extreme cruelty" by a U.S. citizen or lawful permanent resident (LPR) spouse or parent to self-petition for permanent residence. /4/ To successfully self-petition, the spouse or child must show that he or she is of good moral character, has suffered extreme hardship, and that the relationship to the citizen or LPR is based on a good faith marriage. This provision also provides that a self-petition will not be revoked solely because the marriage upon which it is based has been legally terminated. A separate section of the new law allows immigration judges to suspend deportation of spouses and children who are subject to deportation on any ground other than those related to marriage fraud or criminal convictions, if they establish that they: (1) have been physically present in the United States for three years, (2) have been battered or subjected to extreme cruelty by a citizen or LPR spouse or parent, (3) are of good moral character, and (4) are undergoing extreme hardship. /5/

Provisions of the Crime Bill also increase the penalties for alien smuggling from five years to ten years. The sentence is raised to 20 years if the smuggler causes serious injury to the smuggled alien or places the alien's life in jeopardy, and death or life imprisonment if the smuggler causes the death of the smuggled alien. /6/ The penalty for failure to depart after deportation is ordered is increased to four years generally, but is increased to ten years when deportation is based on criminal conviction, use of false documents, alien smuggling, or national security grounds. /7/ Persons who reenter the United States without authorization and who were previously convicted of three misdemeanors for drugs or crimes against persons become subject to a felony with a ten-year maximum penalty. /8/ In addition, the law increases to 20 years the criminal penalty for aggravated felons who reenter without authorization. /9/

Finally, the Crime Bill establishes procedures for expedited deportation without a hearing of persons convicted of aggravated felonies who are neither lawful permanent residents, nor eligible for any relief from deportation. /10/ Notice of the charges against them and an opportunity to inspect the evidence and rebut the charges must be provided. They have the right to representation by counsel at no expense to the government. Under the new law's provisions, the final order of deportation can be entered by an INS officer, but not the officer who issued the order commencing deportation proceedings. Judicial review of deportation orders against aggravated felons is narrowly restricted to challenges to whether the alien is the person described in the deportation order, whether there was a conviction for an aggravated felony and the conviction became final, and whether the limited procedural protections required under the new law were provided. /11/

B. Asylum Law

The most significant development in asylum law was the regulations proposed by INS to substantially change adjudication procedures in applications for asylum, withholding of deportation, and related employment authorization. /12/ According to INS, the new changes were intended to "allow the INS to grant asylum to deserving applicants more promptly and to expedite resolution of the great number of meritless and abusive applications filed each year." /13/

1. Work Authorization

A major feature of the proposed INS regulations is that they will increase the time asylum applicants have to wait to obtain work authorization. /14/ Applicants will not be eligible for work authorization until their asylum applications have been pending for 150 days. Only then may they apply for work authorization, with INS allowing an additional 30 days to adjudicate the request. To do so, INS will have to determine only that the asylum application is still pending, since the new regulations eliminate the current requirement that INS determine that the asylum application is nonfrivolous before it issues a work authorization. Under the new rule, the 150-day time period does not begin to run until a "complete" asylum application has been filed. Incomplete applications will be returned to the applicant. The period also does not include the time between when INS asks for additional evidence from the applicant and when it receives the requested evidence. If an application is denied by an asylum officer or immigration judge, INS will not grant work authorization to the applicant. The proposed rule also extends -- to 90 days from the current 60 days -- the amount of time prior to the expiration of an asylum applicant's work authorization for submission of a renewal application in order to maintain continuous authorization. /15/

The new regulations also eliminate INS discretion in granting work authorization to persons who are in deportation proceedings /16/ The reason given for this change is that other provisions provide a basis for issuing work authorization to "virtually all deserving persons" in exclusion or deportation proceedings. /17/ However, eliminating this provision will leave persons who are in proceedings without a way to obtain permission to work unless and until they apply for a benefit that can be a basis for work authorization.

2. Adjudication of Asylum Applications

Under the proposed regulations, the asylum officer assigned to adjudicate an application is given discretion to determine whether to interview the applicant. However, asylum officers will no longer have the authority to deny applications of persons who may be deportable or subject to exclusion proceedings. Instead, if the officer decides not to grant asylum, the officer must refer the application to an immigration judge, who will adjudicate it during the deportation or exclusion proceedings. /18/ The regulations also would allow INS to use information contained in an application for discretionary relief (e.g., an asylum application) to establish the applicant's deportability. /19/

Finally, the new regulations will add a ground for denying asylum to eligible applicants. Asylum may be denied if the alien can be returned to a country through which the alien passed en route to the United States, but only if the terms of a bilateral or multilateral treaty between that country and the United States would assure that the alien would not be persecuted there, and the country has a full and fair procedure for determining the returnee's asylum claim. /20/

3. Asylum Claims Based on Fear of Persecution Due to Gender

In another development affecting asylum-seekers, the Third Circuit recognized for the first time that an asylum claim based on fear of persecution due to one's gender may fit within the "particular social group" category. In Fatin v. INS, the petitioner was an Iranian feminist who claimed to be opposed to her country's gender-specific laws and social norms, which include the requirement that women wear a special shawl to cover their heads in public. /21/ The court found that the routine penalty for failing to conform to these laws is "74 lashes, a year's imprisonment, and in many cases brutal rapes and death." /22/ Nevertheless, the court denied the woman's asylum application because she did not prove that she would refuse to conform to these laws and norms. Instead, she testified only that "she would find the requirements objectionable and would not observe them if she could avoid doing so." /23/ Although rejecting her claim, the court implied that had the petitioner been able to prove that she would fail to conform to these gender-specific laws, she would have satisfied the "well founded fear of persecution" requirement.

C. Section 212(c) Relief for Permanent Resident Aliens

Section 212(c) of the Immigration and Nationality Act (INA) /24/ allows permanent resident aliens who have established lawful unrelinquished domicile in the U.S. for seven consecutive years to waive most grounds of deportation. Four significant cases during the past year clarified or expanded eligibility for this waiver.

1. Parents' Lawful Domicile Imputed to Child

In Lepe-Guitron v. INS, the Ninth Circuit ruled that the length of time parents have been domiciled as permanent residents of the United States can be imputed to their children for purposes of determining the children's eligibility for section 212(c) relief. /25/ In the case before the court, the child had been a permanent resident alien for only four years prior to applying for a section 212(c) waiver, but had resided with his parents in the United State for almost fourteen years. Furthermore, but for a processing error, the child would have adjusted to permanent residency eight years earlier, at the same time his parents and other siblings adjusted. He argued that his parents' length of domicile as permanent residents should be imputed to him so that he could be considered to have accrued the sufficient time necessary to qualify for a section 212(c) waiver.

The appellate court agreed with this argument and created a "child" exception to the "seven years of lawful unrelinquished domicile" rule. The court based its decision on the fact that children are, "legally speaking, incapable of forming the necessary intent to remain indefinitely in a particular place," and that under common law, the child's domicile follows that of the parent. /26/ The court held that "a child's 'lawful unrelinquished domicile' under section 212(c) is that of his or her parents." /27/ However, the court held that, in order for the exception to apply, the child must currently be a permanent resident alien and have resided with the parent, and the parent must have accrued seven years of unrelinquished domicile in the United States as a permanent resident alien.

2. Firearms Violation Ground for Deportation Waived

In two other cases, appellate courts ruled on the availability of section 212(c) to waive the firearms ground of deportation. Because of the waiver's statutory origin, most circuits provide that lawful permanent residents in deportation proceedings may be granted waivers under 212(c) only for those grounds of deportation that have an equivalent ground of exclusion. These decisions revisited the issue of whether a ground of deportation can be waived in spite of the absence of an equivalent ground of exclusion.

In Rodriguez-Padron v. INS, the Eleventh Circuit joined a growing number of circuit courts to hold that aliens who are deportable under the firearms ground of deportation may not use section 212(c) to waive that ground of deportability. /28/ However, the Second Circuit reached a contrary conclusion in Bedoya-Valencia v. INS, which involved an alien who entered the United States without inspection, holding that lawful permanent residents in deportation proceedings may use section 212(c) to waive a deportability ground for which there is no equivalent ground of exclusion. /29/ Therefore, lawful permanent residents in the Second Circuit may seek 212(c) waivers for the firearms ground of deportation.

3. Common Law Marriage Considered an Equity

Finally, the Ninth Circuit decided in Kahn v. INS that the Board of Immigration Appeals (BIA) erred in denying a 212(c) waiver of deportation when it refused to consider as an equity the petitioner's relationship with a man with whom she had lived in California for several years. /30/ The BIA based its refusal to consider the relationship as an equity on California's refusal to recognize common-law marriages.

The appellate court noted that common-law marriages are recognized in many states and reasoned that the BIA's adoption of state law as the conclusive measure for the existence of family ties would lead to disparate treatment of otherwise similarly situated aliens. Finding that the INA was designed to implement a uniform federal policy, the court concluded that the BIA's interpretation of the statute was not rationally related to the INA's purpose and was thus impermissible.

II. INS Enforcement Issues

A. Civil Document Fraud

During 1994, INS sharply increased its enforcement of the civil document fraud provisions added by the Immigration Act of 1990. /31/ Section 274C of the INA imposes severe penalties on persons or entities that use, manufacture, possess, receive, or accept a false document to satisfy a requirement under the immigration laws. The same penalties apply to using a valid document belonging to another person. Examples of prohibited behavior include submitting false documents to obtain a visa, gain entry to the United States, or satisfy the I-9 employment eligibility verification requirements.

All persons or entities found to have committed document fraud are subject to civil fines; however, the harshest consequence are reserved for noncitizens. If a final order has been entered, they are subject to deportation and permanent exclusion. No waivers exist, except perhaps those pursuant to INA section 212(c) to prevent these outcomes, even if they are married to a U.S. citizen or are otherwise eligible to immigrate.

The forms used by INS to provide notice to respondents of their right to request a hearing on section 274C charges -- the Notice of Intent to Fine (NIF) and the Notice of Rights/Waiver -- fail to adequately communicate these drastic consequences. In enforcing section 274C, INS agents also routinely encourage respondents to sign waivers of their right to request a hearing and misrepresent the consequences of doing so. INS then treats the waiver as final and irrevocable. In addition, the context in which INS provides notice to many respondents greatly exacerbates the above problems. For example, in many cases the NIF is served at the same time as the Order to Show Cause and other documents related to the processing of a deportation or exclusion proceedings. In such cases, the INS provides the respondent detailed information and notices of rights regarding deportation proceedings, as required by statute and case law. /32/ The notice of the right to request a hearing on the 274C charges often is simply lost in the other paperwork. Indeed, it is clear that many respondents believe that they are protecting their rights under section 274C when they request a deportation hearing. Many aliens thus have incurred final orders finding document fraud, either because they unknowingly waived their right to a hearing or they failed to request a hearing within the required 60 days.

In 1994, advocates began defending against these charges and successfully reopened some proceedings to allow their clients to have a hearing on the fraud charges. In August 1994, several advocacy groups joined forces in a class action lawsuit in federal district court in Seattle on behalf of persons who were subject to civil document fraud proceedings without being given adequate notice of the nature and consequences of such proceedings. /33/

B. INS Violations of Fourth Amendment Protections

In two other developments on INS enforcement issues, the Ninth Circuit and a federal district court in El Paso, Texas, ruled that overzealous enforcement by the Border Patrol violated the Fourth Amendment. A settlement in the El Paso case has provided a means to curb Border Patrol abuse of the rights of both aliens and citizens by setting up complaint procedures, outreach, and officer training.

1. Illegal Vehicle Stop and Search

In Gonzalez-Rivera v. INS, the Ninth Circuit upheld an immigration judge's decision to suppress evidence obtained through a vehicle stop that was based solely upon the occupants' Hispanic appearance. /34/ Overturning the BIA's determination that the stop was based upon permissible factors, the appellate court agreed with the immigration judge that it was an egregious violation of the petitioner's Fourth Amendment rights.

In Gonzalez-Rivera, Border Patrol officers stopped the car in which the petitioner was riding with his father outside of San Diego. The petitioner's father had legal residency documents; the petitioner did not, so the officers arrested him. The officers subsequently learned that petitioner had entered the United States without inspection. While in custody, the petitioner did not make any statements or sign any documents. The officers filled in an INS I-213 form with information obtained from the stop and INS commenced deportation proceedings. The petitioner requested a hearing and moved to suppress the evidence gained as a result of the stop. In his motion, the petitioner argued that his detention, arrest, and interrogation were based solely on his Hispanic appearance and therefore violated his constitutional rights. Because deportation proceedings are civil rather than criminal, violations of Fourth Amendment rights generally will not lead to suppression of evidence obtained as a result of such violations. /35/ However, regardless of the type of proceeding, courts will not tolerate egregious Fourth Amendment violations. /36/

The Ninth Circuit agreed with the immigration judge's order finding that the Border Patrol had no reasonable basis for stopping the car in which the petitioner was a passenger. /37/ In order for an INS or Border Patrol officer to stop a vehicle legally (other than at an established checkpoint), the officer must have a reasonable suspicion based upon facts “not mere intuition” that the vehicle contains aliens who may be in the United States without INS permission. /38/ The court examined each of the factors offered by the Border Patrol officer who testified and found that, as a matter of law, they did not establish a reasonable suspicion that the vehicle contained aliens unlawfully in the United States. Rather, the court found that the only basis for the stop was the Hispanic appearance of the petitioner and his father. /39/ Concluding that such a racially motivated action by law enforcement officers is an egregious violation of the Fourth Amendment, and evinces their bad faith, and in the interests of maintaining judicial integrity, the court suppressed the illegally obtained evidence. /40/

2. Lawsuit Against Border Patrol In El Paso

In another important Fourth Amendment case, U.S. citizens of Hispanic descent in El Paso, Texas, settled a historic class action lawsuit brought two years ago against the U.S. Border Patrol. /41/ The case focused on INS/Border Patrol enforcement activities near and inside Bowie High School in El Paso. In December 1992, the federal district court issued a preliminary injunction prohibiting the Border Patrol from violating plaintiffs' Fourth Amendment rights after finding that on numerous occasions Border Patrol officers had illegally questioned, searched, and physically abused teachers and students around the high school.

According to the final settlement, the Border Patrol's office in El Paso agreed to do the following: (1) refrain from conducting searches and seizures that violate the Fourth Amendment; (2) provide all agents with training reinforcing their understanding of the constitutional limits on INS enforcement, including a refresher course for veteran agents and training for all incoming agents; (3) establish procedures to respond to community complaints of misconduct and a toll-free hotline for complaint reports; (4) conduct community outreach in English and Spanish regarding the new complaint procedure and the toll-free number; (5) require agents to offer persons they question but do not arrest a card that identifies the agent and provides information regarding how to file a

complaint; and (6) provide reports to the court for five years regarding implementation of the settlement.

III. Access to Public Benefits

A. FEMA Disaster Relief

In a move that had more symbolic than practical effects, Congress added restrictive language to an emergency appropriations act barring undocumented immigrants from receiving disaster relief for their losses during earthquake that devastated parts of Los Angeles on January 17, 1994. /42/ Access to benefits provided through the Federal Emergency Management Agency (FEMA) previously has been contingent on the recipient's immigration status. However, the restrictive language stated that disaster benefits would not be available to an individual "when it is known to the federal entity or official to which the funds are made available that the individual is not lawfully within the United States." /43/ The appropriations language and FEMA never define the phrase "lawfully within the United States." Moreover, persons whom the disaster relief agency knew were "not lawfully" in the U.S. were nonetheless entitled to other emergency-related benefits, including medical care, shelter, and "food, water, medicine, and other essential needs" within the terms of the act itself. /44/

The restriction also required the federal entity or official administering the funds to "take reasonable steps to determine whether any individual or company seeking to obtain such funds is lawfully within the United States." /45/ Specifically exempted from this "reasonable steps" requirement were persons seeking temporary housing assistance for a period up to 90 days. /46/ Additional safeguards were added before the law was finally enacted protecting against discrimination based on, among other factors, aid applicants' citizenship, national origin, or immigration status. /47/

Recognizing the practical and legal problems inherent in attempting to verify all applicants' "lawful" residence, HUD chose to implement the new restrictions through a self-certification form. Applicants for long-term housing benefits (18-month certificates) had to check a box indicating whether they were a U.S. citizen, lawful permanent resident, or "otherwise lawfully in the United States." FEMA chose to implement a combination of self-certification and random verification by INS. However, by the time the alienage restrictions had been implemented few applicants were affected.

B. Federal Housing

At the end of 1994, HUD issued a long-anticipated proposed rule implementing statutory restrictions for aliens seeking federally financed housing. /48/ Federal housing programs provide tenants and home buyers with a variety of subsidized benefits, including public housing, vouchers and rental payments to landlords, and rural housing for farmworkers. Eligibility is based on financial status, but priority is given to certain persons, such as those who are homeless, are

displaced by a disaster, currently live in substandard housing, or pay more than 50 percent of their income in rent.

Pursuant to alien restrictions imposed by a 1980 statute, but which to date had never been implemented, only certain classes of aliens can participate in HUD-financed housing programs, including: lawful permanent residents, lawful temporary residents, refugees, asylees, parolees, and conditional entrants. /49/ A 1987 statute clarified that some "mixed families" (those that contain both eligible and ineligible family members) can remain in their current subsidized housing, provided certain conditions are met. /50/ The proposed regulations would implement the alien restrictions in those two laws. They provide a detailed explanation of provisions dealing with safeguarding the rights of "mixed families," prorating the value of housing subsidies. They also list acceptable documents to establish alien eligibility and verification required of those documents.

The alien eligibility restrictions will affect public and Indian housing programs, the Housing Development Grant program, and Section 8, Section 236, Rent Supplement, and Section 235 subsidies. The alien restrictions will apply both to new applicants and to persons currently residing in affected housing. /51/

Under the proposed rule, applicants for housing must establish whether or not each member of the family is a U.S. citizen or has a satisfactory immigration status. If none of the family members are eligible, the application will be denied. /52/ If the family is "mixed," the assistance provided will be prorated in order to take into account the presence of ineligible family members. /53/

Families currently receiving housing benefits affected by the restrictions will need to establish the U.S. citizen/alien eligibility of all family members at the time of their annual eligibility review. /54/ If the required evidence is not submitted or no family members establish eligible status, the family will have to leave its housing, unless it can demonstrate that it needs additional time to locate another affordable place to live. A PHA may defer termination for six-month intervals up to a maximum of three years. If the family is a "mixed family" and either the head of the household or spouse is eligible, the family can stay in its housing indefinitely. If it is a "mixed family" but neither the head of the household nor the spouse is eligible, the family's housing subsidy will be prorated in the same manner as that applied to new applicants. /55/

C. General Assistance

In an important court case involving immigrants' rights to public benefits, the Connecticut supreme court found in Barannikova v. Town of Greenwich /56/ that the Connecticut general assistance program's policy of deeming the income of sponsors to immigrant applicants when determining their eligibility for benefits is illegal under the Fourteenth Amendment. In doing so, the court followed the Supreme Court's decision in Graham v. Richardson, /57/ and state courts in Michigan /58/ and New York /59/ which subjected state welfare law distinctions between citizens and resident aliens to strict judicial scrutiny under the Fourteenth Amendment.

The plaintiff in Barannikova challenged the constitutionality of a Connecticut law and regulation that made her and her children ineligible for general assistance because she was unable to provide

information regarding the financial status of her sponsor, her former sister-in-law. /60/ The latter had signed an affidavit of support that was presented to the INS when the plaintiff entered the United States as a lawful permanent resident. The Connecticut law that the plaintiff challenged is similar to the AFDC deeming law, which provides that the income of an immigrant's sponsor be deemed available to the immigrant for three years for purposes of determining the immigrant's eligibility for AFDC benefits. /61/ Under the federal law, a "sponsor" is someone who has submitted an affidavit of support on the sponsored immigrant's behalf, whether or not the sponsor actually contributes to the immigrant's support. The Connecticut deeming law, however, applies not to AFDC, but rather to the state-authorized and -funded general assistance program, which provides cash assistance to persons who are ineligible for federal AFDC.

The court rejected the defendants' argument that since, under the Constitution, federal restrictions on benefits to noncitizens are generally permissible, as long as they are rationally related to some governmental interest, the same standard should apply to state welfare-law restrictions. Instead, the court found that under the Fourteenth Amendment, state laws that discriminate between citizens and immigrants should be generally subject to "strict scrutiny," and upheld only if they are necessary to accomplish a compelling state interest. The court ruled that merely saving money by not providing benefits to recently arrived lawful immigrants is not a compelling state interest sufficient to justify discrimination based on alienage. /62/

D. Welfare and Health Care

Finally, for immigrants' rights advocates, 1994 was probably most notable for several failed federal legislative proposals affecting immigrants' eligibility for health care and social services. Though the year began inauspiciously with implementation of a law extending the sponsor deeming restrictions in the SSI program from three years to five years, /63/ efforts to extend sponsor deeming to other programs and for longer periods fizzled. In an effort to fund welfare and health care "reform" by taking money away from services to lawful immigrants, members of Congress and the president advanced various proposals to extend deeming: to five years for the AFDC and Food Stamp programs; /64/ until an immigrant becomes a U.S. citizen for AFDC, SSI, and food stamps; /65/ and by adding deeming to the Medicaid and unemployment insurance programs, and deeming sponsors' income until an immigrant becomes a citizen. /66/

One major bill proposed to eliminate immigrant eligibility for the four major federal benefit programs: AFDC, SSI, food stamps, and Medicaid. /67/ Another would have eliminated immigrant eligibility for those and every other federal program. /68/ Others tried to eliminate the "color of law" category of eligibility for SSI, AFDC, and Medicaid, and replace it with fewer, more narrowly-defined immigration classifications. /69/ Finally, at least two of the failed legislative proposals -- some of which are likely to be resurrected in the next session of Congress -- would have tightened the public charge ground of deportation, making a permanent resident alien subject to deportation if he or she received federal benefits for more than twelve months. /70/

California Anti-Immigrant Ballot Initiative Passes But is Enjoined

Proposition 187, a California ballot initiative that would preclude undocumented aliens from obtaining education, health care, and various social services, passed overwhelmingly on November 8, 1994. However, on November 9, almost all provisions of the new state law were enjoined by the courts.

Two sections of Proposition 187 affect access to education: one bars noncitizens from public elementary and secondary schools unless they are permanent resident aliens or otherwise authorized to be present in the U.S.; the other bars those same persons from post-secondary educational institutions. Two other sections of Prop 187 prohibit noncitizens from obtaining public social services or health care unless they prove that they are either a permanent resident alien or an alien "lawfully admitted for a temporary period of time." Social service agency personnel, health care providers, and school officials would be required to verify the citizenship or lawful immigration status of all applicants for these benefits, report to the INS and the state any person suspected of being here illegally, and issue a written notice to those persons instructing them to obtain legal status or leave the U.S.

Two other sections of Proposition 187 impose increased penalties for use or manufacture of fraudulent citizenship or resident alien documents. The remaining sections involve closer coordination between the state police or the state attorney general and the INS regarding persons suspected of being here illegally.

On November 9, 1994, eight lawsuits were filed seeking to enjoin implementation of the new state laws. The three cases filed in San Francisco Superior court challenging the restrictions on alien eligibility for school were consolidated. /71/ The state court judge issued a TRO that day blocking the education-related sections of the proposition from taking effect until February 8, 1995, at which time the court is expected to make a ruling on the parties' application for a preliminary injunction.

Four cases were filed in federal district court in Los Angeles and have been consolidated. Three of the cases challenge the educational restrictions, based equal protection arguments. /72/ The fourth lawsuit challenges the entire proposition on constitutional grounds, arguing mainly that the measure is preempted by federal law. /73/ The district court judge issued a TRO on November 16, 1994, barring implementation and enforcement of all sections of the proposition except those two relating to increased criminal penalties for use of fraudulent documents. The TRO will remain in effect until December 14, 1994, at which time the court will hold a hearing on the preliminary injunction motion.

The eighth court challenge was filed in federal district court in Sacramento, and it challenges, on statutory grounds, the alien restrictions imposed on access to health care and public social services. /74/

Footnotes

/1/ Departments of Commerce, Justice, and State, The Judiciary and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, secs. 212, 245, Secs. 1182(o), 1255(b) -- (d), 108

Stat. 1724, 1765 -- 66 (1994) (amending the Immigration and Nationality Act (INA), 8 U.S.C. Secs. 1101 -- 1525).

/2/ Family Unity status is available to the spouses and unmarried children of aliens who legalized under either the farmworker or general amnesty program. The spouse or child must have entered the U.S. prior to May 5, 1988, and not be deportable under specified grounds. Immigration Act of 1990, Pub. L. No. 101-649, Sec. 301, 104 Stat. 4978, 5029 -- 30.

/3/ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

/4/ Id. sec. 40701, Sec. 204(a)(1), 108 Stat. at 1953 -- 55 (amending INA at 8 U.S.C. Sec. 1154(a)(1)).

/5/ Id. sec. 40703, Sec. 244(a)(3), 108 Stat. at 1955 (amending INA at 8 U.S.C. Sec. 1254(a)(3)).

/6/ Id. sec. 60024, Sec. 274(a), 108 Stat. at 1981 -- 82 (amending INA at 8 U.S.C. Sec. 1324(a)).

/7/ Id. sec. 130001(a), Sec. 242 (e), 108 Stat. at 2023 (amending INA at 8 U.S.C. Sec. 1252(e)).

/8/ Id. sec. 130001(b), Sec. 276(b), 108 Stat. at 2023 (amending INA at 8 U.S.C. Sec. 1326(b)).

/9/ Id.

/10/ Id. sec. 130004(a), Sec. 242A(b), 108 Stat. at 2026 -- 27 (amending INA at 8 U.S.C. Sec. 1252a).

/11/ Id. sec. 130004(b), Sec. 106, 108 Stat. at 2027 (amending INA at 8 U.S.C. Sec. 1105a).

/12/ 59 Fed. Reg. 14779 (Mar. 30, 1994) (to be codified at 8 C.F.R. Secs. 103, 208, 236, 242 and 274a). Although expected, INS did not issue the final rules within the time frame necessary to be included in this article. [See box accompanying this article].

/13/ Id. at 14779.

/14/ Id. at 14785 (to be codified at 8 C.F.R. Sec. 208.7(a)(1)).

/15/ Id. at 14782 (to be codified at 8 C.F.R. Sec. 208.7(d)).

/16/ Id. at 14780 -- 81. The current provision at 8 C.F.R. Sec. 274a.12(c)(13) will be eliminated and reserved for future use.

/17/ Id. at 14781.

/18/ Id. at 14786 -- 87 (to be codified at 8 C.F.R. Sec. 208.14(b)).

/19/ Id. 14788 (to be codified at 8 C.F.R. Sec. 242.17(e)).

/20/ Id. at 14787 (to be codified at 8 C.F.R. Sec. 208.14(e)).

/21/ Fatin v. INS, 12 F.3d 1233 (3rd Cir. 1993).

/22/ Id. at 1241.

/23/ Id.

/24/ 8 U.S.C. Sec. 1182(c)

/25/ Lepe-Guitron v. INS, 16 F.3d 1021 (9th Cir. 1994).

/26/ Id. at 1025.

/27/ Id. at 1024.

/28/ Rodriguez-Padron v. INS, 13 F.3d 1455 (11th Cir. 1994).

/29/ Bedoya-Valencia v. INS, 6 F.3d 891 (2d Cir. 1993).

/30/ Kahn v. INS, 20 F.3d 960 (9th Cir. 1994).

/31/ Immigration Act of 1990, Pub. L. No. 101-649, sec. 544(a), Sec. 274C, 104 Stat. 4978, 5059 -- 61 (codified as amended at 8 U.S.C. Sec. 1324c).

/32/ INA, Sec. Sec. 242B, 8 U.S.C. Sec. 1252b; Lopez v. INS, No. CV-78-1912-WMB (C.D.Cal. 1992).

/33/ Walters v. Reno, No. C-94-1204 (W.D. Wa. Aug. 15, 1994).

/34/ Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994).

/35/ INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

/36/ Id. at 1046.

/37/ Gonzalez-Rivera, 22 F.3d at 1446.

/38/ U.S. v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

/39/ Gonzalez-Rivera, 22 F.3d at 1446 -- 47

/40/ Id. at 1452.

/41/ Murrillo v. Musgades, No. EP-92-CA-319B (W.D. Tex. 1994).

/42/ Emergency Supplemental Appropriations Act of 1994, Pub. L. No. 103-211, 108 Stat. 3.

/43/ Id. tit. IV, Sec. 403(1), 108 Stat. 3, 40.

/44/ Id. Sec. 403(2).

/45/ Id. Sec. 403(4).

/46/ Id. Sec. 403(3).

/47/ Id. Sec. 403(5).

/48/ 59 Fed. Reg. 43900-954 (Aug. 25, 1994).

/49/ 42 U.S.C. Sec. 1436a (added by Pub. L. No. 96-399, tit. II, Sec. 214, 94 Stat. 1637).

/50/ Housing and Community Development Act of 1987, Pub. L. No. 100-242, tit. I, sec. 164(a) -- (f)(1), Sec. 1436a, 101 Stat. 1815, 1860 -- 63 (1988) (codified as amended at 42 U.S.C. Secs. 1436a(a) -- (h)).

/51/ 59 Fed. Reg. at 43917 -- 18 (to be codified at 24 C.F.R. Sec. 200.180(c)(1)).

/52/ Id. at 43918 -- 19 (to be codified at 24 C.F.R. Secs. 200.182(a), 200.182(b)(1)).

/53/ Id. at 43918 -- 19, 43923 -- 24 (to be codified at 24 C.F.R. Secs. 200.182(b)(2), 200.188).

/54/ Id. at 43919 -- 20 (to be codified at 24 C.F.R. Sec. 200.183(g)(2)). However, each family member is required to submit evidence of eligible status only once during continuously assisted occupancy under any affected program. Id. at 43920 (to be codified at 24 C.F.R. Sec. 200.183(g)(5)).

/55/ Id. at 43920 -- 22 (to be codified at 24 C.F.R. Secs. 200.183(i), 200.186, and 200.187).

/56/ Barannikova v. Town of Greenwich, 229 Conn. 664 (1994).

/57/ Graham v. Richardson, 403 U.S. 365 (1971).

/58/ El Souri v. Department of Social Services, 414 N.W.2d 679 (Mich. 1987).

/59/ Minino v. Perales, 589 N.E.2d 385 (N.Y. 1992).

/60/ Conn. Gen. Stat. Sec. 7 -- 273(d).

/61/ 42 U.S.C. Sec. 615(a).

/62/ Barannikova, 229 Conn. at 690.

/63/ Unemployment Compensation Amendments of 1993, Pub. L. 103-152, Sec. 7(a)(1), 107 Stat. 1516, 1519 (codified as amended at 42 U.S.C. Sec. 1382j).

/64/ Work and Responsibility Act, S. 2224, 103d Cong., 2d Sess., Sec. 903 [hereinafter S. 2224].

/65/ Welfare Reform Act of 1994, S. 1795, 103d Cong., 2d Sess., Sec. 601(b)(2) [hereinafter S. 1795]; S. 2224, supra note 64, Sec. 903.

/66/ S. 1795, supra note 65, Sec. 601(b)(2); Comprehensive Immigration and Asylum Reform Act of 1994, S. 1884, 103d Cong., 2d Sess., Sec. 802 [hereinafter S. 1884].

/67/ The Independence for Families Act, H.R. 4414, 103d Cong., 2d Sess., Secs. 701 -- 2, 704 -- 5 (1994).

/68/ The Responsibility and Empowerment Support Program Providing Employment, Childcare, and Training Act, H.R. 3500, 103d Cong., 2d Sess., Sec. 601 (1994).

/69/ S. 1795, supra note 65, Sec. 601(c)(1)(B); S. 2224, supra note 64, Sec. 902.

/70/ S. 1795, supra note 65, Sec. 601(b)(1); S. 1884, supra note 66, Sec. 803.

/71/ Pedro A. v. Dawson, Case No. 965089 (Super. Ct. San Francisco filed Nov. 9, 1994); Los Angeles Unified Sch. Dist. v. Wilson, No. 965085 (Super. Ct. San Francisco filed Nov. 9, 1994); Jesus Doe v. Wilson, No. 965090 (Super. Ct. San Francisco filed Nov. 9, 1994).

/72/ LULAC v. Wilson, No. 94-7569 MRP (JRx) (C.D. Cal. filed Nov. 9, 1994); Ayala v. Wilson, No. 94-7571 (C.D. Cal. filed Nov. 9, 1994); Children Who Want An Education v. Wilson, No. 94-7570 JMI (GHKx) (C.D. Cal. filed Nov. 9, 1994).

/73/ Gregorio T. v. Wilson, No. 94-7652 JMI (GHKx) (C.D. Cal. filed Nov. 9, 1994).

/74/ Gillen v. Belshe, No. CV-S-94-1848 WBS JFM (E.D. Cal. filed Nov. 9, 1994).

The cases challenging the education-related restrictions rely on the 1982 Supreme court case, Plyler v. Doe, which guaranteed access to primary and secondary schools to children regardless of their immigration status. California courts have strengthened this argument by recognizing education as a fundamental right under the state constitution.

The federal suit challenging all aspects of Proposition 187 as unconstitutional charges that the new state law violates the Supremacy Clause of the U.S. Constitution, which grants only to the federal government the power to regulate immigration. The suit alleges that Proposition 187 attempts to control the flow of immigrants into and out of California by establishing eligibility standards for

education and social service programs that conflict with federal law, and by implementing verification and reporting requirements that violate due process and equal protection.

During the pendency of these court injunctions, the state can take no action to implement Proposition 187. While state officials have been instructed to draft "emergency" regulations interpreting the new statutory provisions and circulate them internally for review, the state is enjoined from publishing, publically disseminating, or implementing them until allowed by the courts.

Late Development on Asylum Regulations

On December 5, 1994, INS issued the final rules on adjudication procedures in asylum applications, withholding of deportation, and related employment authorization. The final rules can be found at 59 Fed. Reg. 62284 (Dec. 5, 1994). We regret that due to our tight schedule, we were unable to reflect this development in the text and footnotes of Section I.B. Asylum Law.