International Lawyer

Volume 33
Number 2 *International Legal Developments in Review: 1998*

Article 22

1999

Immigration and Nationality

Andrew I. Schoenholtz

Thomas F. Muther Jr.

Immigration and Nationality

ANDREW I. SCHOENHOLTZ AND THOMAS F. MUTHER, JR.*

I. Introduction

The legislative, executive, and judicial branches of the U.S. government, as well as the United Nations, contributed to significant developments in refugee and immigration law and policy this year. Congress enacted new laws providing humanitarian relief to Haitians and enabling businesses to hire skilled workers on a temporary basis. Once again, agricultural interests were unsuccessful in creating a new guestworker program, but they came much closer this time. Congress continued to reverse portions of the 1996 welfare reform legislation, but generally only as they apply to immigrants already receiving assistance. The executive branch focused on an array of issues relating to Central Americans: adjustment of status, naturalization, the affidavit of support, expedited removal, children's asylum claims, the Torture Convention, criminal aliens, detention and alternatives to detention, representation and rights presentations, streamlining the administrative appeals process, and Immigration and Naturalization Service (INS) restructuring. All levels of the federal judiciary are engaged in reviewing important refugee and immigration law cases. At the international level, the United Nations issued guidelines on the law of internal displacement.

II. Temporary Worker Legislation

Temporary work programs have been the subject of considerable interest during the past few years. The trend has been towards expansion in certain of these categories. In 1998, for example, Congress passed legislation to increase the number of professionals and specialty workers admitted under the H-1B temporary visa program. Congress agreed with industry claims of a shortage of professionals in information technology fields. In a bill that reflects

*Andrew I. Schoenholtz, a Co-Chair of the Immigration and Nationality Committee of the ABA Section of International Law and Practice, is Director of Law and Policy Studies at Georgetown University's Institute for the Study of International Migration. Thomas F. Muther, Jr., a member of the Immigration and Nationality Committee of the ABA Section of International Law and Practice, is Assistant Regional Counsel, United States Department of Justice, Immigration and Naturalization Service, Burlington, Vermont. The opinions expressed in this article are those of the authors and in no way are meant to represent the present or future position of the Immigration and Naturalization Service.

some of the tensions inherent in the politics of immigration reform, employers received the additional visas but must pay a new processing fee that will be used to increase training opportunities for U.S. residents interested in the computer field. The bill also includes additional protections on wages, benefits, and working conditions. Opponents of the legislation nevertheless fear that temporary work programs are inherently exploitive, particularly when workers are bound to specific employers during their stay in the United States.

The new law provides for 115,000 H-1B visas in fiscal years 1999 and 2000, and 107,500 in 2001. After that, the numerical cap would revert to 65,000 annually. Starting on December 1, 1998, employers of H-1B professionals have to pay $610 instead of the previous $110 fee every time that they submit an initial petition, an extension application, or a concurrent employment petition. University, non-profit, and governmental research centers are exempted from the additional $500 fee.

The fees are earmarked largely to finance job training for U.S. workers through the Department of Labor and university scholarships for low-income students in math, engineering, and computer science through the National Science Foundation. A small percentage of the fees will be given to DOL and INS for the purpose of, among other things, reducing LCA processing to the legally-required seven days, and processing H-1B petitions within one month.

When DOL issues final regulations, "H-1B dependent employers," generally those with fifteen percent or more H-1B employees in their overall workforce, will be required to attest to two additional requirements on their LCA's. A recruitment attestation requires these employers to use good faith efforts to recruit U.S. workers using industry-wide standard practices. A displacement attestation requires these employers to promise that they will not submit a petition for an H-1B worker for a position where a U.S. worker has been laid off within the past ninety days or where a U.S. worker will be laid off within the next ninety days. The new attestations are not required, however, if the only non-immigrants for whom the LCA is filed have a master's degree (or its foreign equivalent) in a field related to the position, or will receive wages and other compensation (including cash bonuses and similar compensation) at or above $60,000 annually.

Given the high proportion of the workforce in certain unskilled industries, particularly agricultural and food processing, that is believed to be working illegally, and the low usage of the existing temporary worker programs for non-professionals, there have been recurrent calls for expanding legal temporary work opportunities. Several such proposals went to the last Congress, with significant action having been taken on two bills. The House Subcommittee on Immigration and Claims reported out a bill for a pilot agricultural worker program. In a surprise move, the Senate adopted a more expansive program under a bipartisan agreement negotiated by Senators Smith and Wyden of Oregon.

The support for the programs came from businesses interested in maintaining a steady supply of low cost labor to perform agricultural services. The proponents acknowledge that labor shortages do not now exist because of the large number of illegal aliens who continue to work in agriculture. They express fears, however, that more effective immigration enforcement will lead to labor shortages and businesses will be unable to find a sufficient number of legal workers to perform the needed activities. Anticipating future problems, they call for immediate legislation to ease their access to legal foreign workers.

The opposition to these proposals focused on several issues, some inherent in such programs. It was argued that an expanded guest worker program would stimulate, not reduce, illegal migration. In the absence of effective controls on illegal work, there was little to stop someone

entering legally to do agricultural work from moving without authorization into urban labor markets. Further, levels of unemployment in agricultural counties in the United States were still very high (double-digit), raising serious questions about claims of an impending shortage of workers. Mechanization initiatives had proved effective in weaning some agriculture sectors from dependence on foreign labor, even where there were labor shortages. Finally, the proposals included few labor standards, in terms of wages or working conditions, and eliminated the requirement that an employer provide housing.

In this case, opposition to an expanded guest worker program prevailed. Given the bipartisan support for some of the proposals, however, it is likely that new initiatives will be introduced in this and future Congresses.

III. Haitian Legislation

In an executive order dated December 27, 1997, President Clinton directed the Attorney General to provide certain Haitian nationals with deferred enforced departure (DED). DED permitted eligible Haitians to remain and work in the United States for one year, in which time Congress was expected to enact legislation addressing the designated group. The order affected Haitian nationals who applied for asylum or were paroled into the United States before December 31, 1995. Haitians convicted of an aggravated felony while in the United States, or suspected of persecuting others in their home country, were specifically barred from this relief.

Perceived to be a significant victory for Haitian advocates and the Congressional Black Caucus, the Haitian Refugee Immigration Fairness Act of 1998 (Haitian Fairness Act) was enacted on October 21, 1998.[1] The Haitian Fairness Act permits the adjustment of status of Haitian nationals who were present in the United States on December 31, 1995, and either: (1) filed for asylum before December 31, 1995; (2) were paroled into the United States before December 31, 1995, after having been identified as having a credible fear of persecution; or (3) were under the age of twenty-one at the time of their arrival in the United States and on December 31, 1995, were without their parents and have remained without parents in the United states since their arrival, have become orphaned since their arrival, or were abandoned by parents or guardians prior to April 1, 1998, and have remained abandoned. Eligible applicants must have been physically present in the United States between the time of their arrival or entry and the time their adjustment application was filed, and cannot have incurred absences after December 31, 1995, which, in aggregate, exceed 180 days.

Haitians eligible for adjustment of status under the Haitian Fairness Act are exempted from certain grounds of inadmissibility pursuant to § 212 of the Immigration and Nationality Act (INA). Specifically, aliens may adjust even though they would have been previously inadmissible based upon the likelihood of their becoming a public charge, entering without inspection, being an immigrant not in possession of valid documentation, and certain other bars for unlawful presence. Likewise, aliens barred from adjustment of status based on other grounds of inadmissibility, such as certain criminal aliens and aliens who entered the United States by fraud, may apply for waivers of inadmissibility in conjunction with their applications for lawful permanent residence. Finally, Haitian aliens with prior orders of removal, deportation, or exclusion may apply for adjustment of status without having to reopen their previous case.

1. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277 112 Stat. 2681 [hereinafter Omnibus Act].

The application period for the Haitian Fairness Act runs until April 1, 2000. Nonetheless, due to a lack of implementing regulations, no applications were filed at the close of 1998. Recognizing this problem, on November 23, 1998, INS announced that the implementing regulations would be in place by early 1999, and thus granted an automatic extension of work authorization for those granted DED one year earlier.[2] In doing so, the INS hoped to "provide ample opportunity for the Haitian beneficiaries of DED to apply for adjustment of status pursuant to section 902 of the Haitian Refugee Immigration Fairness Act of 1998."[3] The Haitian Fairness Act is expected to benefit some 50,000 Haitians.

IV. Implementation of NACARA

In 1998, the Department of Justice (DOJ) initiated the implementation of the Nicaraguan Adjustment and Central American Relief Act (NACARA), the major legislative enactment to date addressing the various Central American populations that came to the U.S. beginning some two decades ago. NACARA provides legal permanent resident status to thousands of Nicaraguans and Cubans illegally present in the United States. NACARA also reduced the strict requirements of cancellation of removal for aliens from certain Central American and Eastern European countries.

A. Nicaraguans and Cubans Under NACARA

On May 21, 1998, DOJ issued interim regulations implementing section 202 of NACARA, which allows eligible Nicaraguan and Cuban nationals to adjust status to permanent residence. To qualify, the applicant must prove continuous physical presence in the United States since December 1, 1995. An alien cannot establish this if he or she has been absent from the United States for an aggregate of more than 180 days during the qualifying period. In addition, the applicant must be otherwise admissible to the United States. However, applicants who are inadmissible pursuant to section 212 of the Act because of public charge, entry without admission, being an immigrant not in possession of valid documentation, and certain bars for unlawful presence, are exempt from these requirements. Pursuant to 8 C.F.R. § 245.13,[4] applicants may also apply for one or more of the immigrant waivers of inadmissibility under section 212 of the INA. Likewise, applicants with prior orders of removal, deportation, and exclusion may apply for NACARA relief despite statutory time-bars for adjustment of status. Finally, an applicant must apply for NACARA relief before April 1, 2000.

The regulation requires each applicant to submit an Application to Register Permanent Residence or Adjust Status (Form I-485) regardless of whether relief is sought through the Service or EOIR. In addition to Form I-485, applicants must provide documentary evidence establishing commencement of physical presence, including state driver's license, county or municipal hospital records, school transcripts, income tax records, and any correspondence between the alien and the Service. The applicant is also required to provide a copy of his or her birth certificate, a report of medical examination, two photographs, and a police clearance letter from every jurisdiction where every eighteen-year-old or older applicant has resided for more than six months. If an applicant has departed the United States since December 1, 1995,

2. *See* Extension of Work Authorization for Certain Haitians Previously Granted Deferred Enforced Departure, 63 Fed. Reg. 68799 (1998).

3. *Id.*

4. Adjustment of Status of Certain Nationals of Nicaragua and Cuba, 8 C.F.R. § 245.13 (1998).

the applicant must provide an attachment showing the date of the applicant's last arrival, the date of and reason for each departure, and the date, manner, and place of each return to the United States.[5]

B. Other Central Americans and Eastern Europeans Under NACARA

While granting amnesty to Nicaraguan and Cuban nationals, NACARA also granted relief, albeit less generous, to Salvadorans and Guatemalans, as well as to nationals of the former Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, and any state of the former Yugoslavia. On November 24, 1998, DOJ issued a proposed rule that would allow those NACARA beneficiaries who have asylum applications pending with INS to apply as well for suspension of deportation or cancellation of removal under the statutory requirements set forth in NACARA.

Asylum officers will adjudicate such applications in the first instance. According to the proposed rule, integrating the processing of such applications into the INS Asylum Program will provide an efficient mechanism for considering the suspension of deportation and special rule cancellation of removal applications of most of the approximately 240,000 registered class members of the *American Baptist Churches v. Thornburgh* litigation, known as the *ABC* case, and certain other beneficiaries with pending asylum applications. The Immigration Court will retain exclusive jurisdiction over most of the suspension of deportation and special rule cancellation of removal applications submitted by NACARA beneficiaries who have been placed in deportation or removal proceedings.

The proposed rule did not provide for a group determination of the "extreme hardship" requirement. Many of those who filed comments argued that establishing categories of persons whose removal would constitute an "extreme hardship" would permit more efficient processing of these applications. Reportedly, DOJ is studying this course of action.

V. U.S. Grants Temporary Protection to Hondurans and Nicaraguans

In response to the devastating impact of Hurricane Mitch and to requests from Central American governments, the Clinton administration granted temporary protection to some 150,000 Hondurans and Nicaraguans now in the United States without a legal status. About one-half of a million unauthorized Salvadorans and Guatemalans were provided with much more limited relief—permission to remain in the United States until March 1999.

Announced on December 30, 1998, these measures aim at augmenting U.S. aid to the countries most affected by Hurricane Mitch this past fall. Many of these Central Americans send remittances home where they are desperately needed. In addition, by allowing them to remain longer, the United States gives the affected nations time to cope with destabilizing conditions and rebuild, rather than overwhelm them with more people to care for.

Pursuant to § 244 of the Immigration and Nationality Act, Attorney General Janet Reno found that an environmental disaster existed in Honduras and Nicaragua, substantially disrupting living conditions, as a result of which those two nations are unable, temporarily, to handle adequately the return of their nationals. This is only the second time since Congress enacted the temporary protection statute that the Department of Justice has designated a country in

5. *See id.* § 245.13(e)(12).

connection with a natural disaster. This occasion involves a larger number of affected migrants, as very few nationals of Montserrat were in the United States when that country was designated for temporary protection after the volcanic eruption in August 1997.

The attorney general granted the initial designation for the maximum period allowed under the statute, eighteen months. To qualify, nationals of Honduras and Nicaragua must have "continuously resided" in the United States since December 30, 1998. Eligible nationals are granted work authorization through July 5, 2000. A grant of Temporary Protected Status (TPS) does not preclude or adversely affect an application for asylum or any other immigration benefit. Most of the Nicaraguans are eligible to apply as well for legal permanent residence under NACARA.

With regard to Salvadorans and Guatemalans, the INS first stayed removals in November and extended that stay until March 8, 1999. At that time, INS will review conditions in El Salvador and Guatemala and determine whether a further extension is called for. In explaining the different treatment of the two groups of Central Americans, INS Commissioner Doris Meissner cited much greater storm damage in Honduras and Nicaragua. Of an estimated three million Central Americans who had to flee their homes in the disaster, about ninety percent live in those two countries, she said. The "vast majority" of internally displaced Salvadorans and Guatemalans have already returned to their homes, according to the commissioner.

While they welcome the temporary relief, advocates for Salvadorans, Guatemalans, and Hondurans say they will press for the same treatment received from the last Congress for Nicaraguans, Cubans and Haitians—automatic permanent residence. Currently, certain Salvadorans and Guatemalans may qualify for permanent residence if they can show that return to their native countries would impose an "extreme hardship" on them or on their U.S. citizen or legal permanent resident family member.

Other reactions to the temporary relief policies include concerns that such temporary measures will become permanent even once conditions improve in Central America. But what policymakers may have to focus on soon are future movements from the region. The grant of temporary protection does not cover those directly affected by the devastation who try to migrate, nor does the statute permit such a policy. Reportedly, movements north are on the increase, in part based on a perception that this new policy allows those hit by Mitch to migrate to and work in the United States. The INS Commissioner said that the United States is trying to get the word out in Honduras, where the majority of the movements are emanating from, that the new policy does not allow the victims of Hurricane Mitch to enter and work in the United States. "Frankly," she said, "one of the best ways of influencing the information is if some people do start to come and are returned quickly."

One other important temporary protection policy development occurred this year. While the TPS statute does not allow the United States to provide temporary protection to those who flee a civil war after the date that the attorney general designates a country under the program, the attorney general may redesignate a country so that those who have arrived since the initial cutoff date can be protected. In April 1997, Liberia became the first redesignated TPS country so that the United States could extend protection to those who arrived on or before June 1, 1996, but missed the original designation's March 27, 1991 cutoff. This fall, Liberia was once again redesignated, making TPS available to eligible Liberians residing in the United States as of September 29, 1998. This rolling cutoff date has provided a means for the United States to respond to the humanitarian need of at least some of those who have fled as the civil war continues.

VI. Supreme Court Reviewing "Serious Non-political Crime" Issue in Refugee Law Case

At the request of the solicitor general, the Supreme Court has granted review of a case directly interpreting an important exclusion clause of the 1951 Convention on the Status of Refugees. Article 1F(b) declares that the convention "shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."[6] The language of the Refugee Act of 1980 closely mirrors the convention provision. *INS v. Juan Anibal Aguirre-Aguirre*[7] concerns a Guatemalan student leader who applied for asylum and withholding of deportation before an Immigration judge in 1995. He claimed that his student group protested against the Guatemalan government for raising student bus fares and for its failure to investigate, and possible complicity in, the mysterious disappearances and deaths of political activists. The mode of protest involved the burning of some ten buses and the trashing of several stores. To ensure that ordinary citizens were not on board these buses when they were set afire, the students explained why and how they were protesting and encouraged people to get off the buses. Some people did so, others were forced off with the use of sticks. The student began to receive letters threatening the lives of the leadership of his group if the violent protests did not cease. He alleged written or direct threats from the government and the guerrillas, leading him to flee to the United States.

The history of the case is quite unusual. The immigration judge granted both asylum and withholding of deportation. On appeal by the INS, the Board of Immigration Appeals (BIA) reversed. The BIA decision on asylum consists of two sentences. Based on the nature of the student's acts against ordinary citizens, the board deemed him unworthy of a discretionary grant of asylum, and as such, considered it unnecessary to address his eligibility for asylum. Its decision on withholding of deportation or non-refoulement consisted of one short paragraph. The board found that while the student's group had a political agenda and its protests attracted the attention of both the Guatemalan government and the guerrillas, the destruction of property and assaults on civilians were disproportionate and outweighed the political nature of the acts. As such, the board held that the student was barred from withholding of deportation.

A divided panel of the Ninth Circuit Court of Appeals reversed the board's decision. Citing the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*,[8] the majority held that the board should have considered whether the acts committed were "grossly out of proportion to the alleged objective."[9] The majority further held that the board should have considered the severity of the persecution that the student might suffer if returned to Guatemala, again citing the *Handbook*: "If a person has a well-founded fear of very severe persecution, e.g., persecution endangering his life or freedom, a crime must be very grave in order to exclude him."[10] Accordingly, the Ninth Circuit remanded the case to the board.

6. 1951 Convention on the Status of Refugees, UNHCR, art. 1(F)(b), (1951).
7. Immigration & Naturalization Serv. v. Aguirre-Aguirre, 119 S. Ct. 39 (1998).
8. *See* Aguirre-Aguirre v. Immigration & Naturalization Serv., 121 F.3d 521, 522 (9th Cir. 1997).
9. *See id.* at 524.
10. *See id.*

The case raises important interpretive issues regarding the Refugee Convention's exclusion clauses, as well as the issue of deference to the attorney general in matters of immigration. Oral argument is scheduled for March 1999.

VII. Judicial Review of Removal Orders

During 1998, several circuit courts grappled with the issue of whether a writ of habeas corpus brought against the INS by an individual in removal proceedings was permissible under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Specifically, the judicial debate focused on § 242(g) of the act, which reads: "except as provided elsewhere in this section, no court shall have the jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."[11] This language, relatively unassuming on its face, sparked a bitter debate in the circuit courts of appeal.

The First Circuit addressed § 242(g) in *Goncalves v. Reno*.[12] At issue was whether habeas corpus review survived Congress' amendments to the INA. The court held that the district court was the proper forum for an alien to raise a challenge to the decision of the attorney general, and a petition for habeas corpus review was the proper vehicle. The court, sending a message to Congress, stated that where the intent is to repeal or restrict habeas relief, legislation must explicitly say so.

The Second Circuit adopted the *Goncalves* approach in *Henderson v. INS*.[13] In *Henderson*, the court held that lawful permanent residents found deportable for criminal activities while in the United States may petition for habeas review despite Congress' enactment of IIRIRA. In so finding, the court noted that although Congress may exercise broad discretion over immigration matters, this type of legislation remains checked by the constitution. While Congress unequivocally indicated its desire to impose limitations on judicial review, IIRIRA failed to explicitly identify the extent of those limitations. The court refused to find that Congress repealed habeas corpus relief by implication. Instead, the court determined habeas relief to be appropriate, because such relief arises in the context of executive detention, where the petitioner has not been afforded a hearing by a state or federal court. Accordingly, the court located subject matter jurisdiction to hear Henderson's petition for habeas corpus.

The Eleventh Circuit, when presented with the habeas question, declined to follow the *Goncalves* approach in *Richardson v. Reno*.[14] In *Richardson*, the court held that Article III of the U.S. Constitution provides Congress with the unique authority to establish the jurisdictional parameters of the lower federal courts. Therefore, the court continued, by enacting § 242(g) Congress repealed all statutory jurisdiction over immigration decisions not specifically enumerated in § 242, including habeas corpus review. In reaching this decision, the court looked to three factors.

First, utilizing a literal interpretation of the statute, the court resolved that § 242(g) unequivocally states that aliens may seek judicial review exclusively in the court of appeals and only following a final order of removal. The court stressed, "[w]hen Congress says 'any' it means 'any' law, which necessarily includes § 2241."[15] Second, the court pointed out that § 242(e)(2)

11. Immigration and Nationality Act (INA) 8 U.S.C.S. § 1252(g) (Law. Co-op. 1997).
12. Goncalves v. Reno, 144 F.3d 110, 117 (1st Cir. 1998).
13. Henderson v. Immigration & Naturalization Serv., 157 F.3d 106 (2nd Cir. 1998).
14. Richardson v. Reno, 162 F.3d 1338 (11th Cir. 1998).
15. *See id.* at 1357.

creates a narrow margin of habeas relief for specifically enumerated purposes. The fact that Congress provided for specific kinds of habeas review within an alternate section evidences a clear understanding of the effects of § 242(g) on habeas relief generally. Finally, the court noted that Congress, through the enactment of AEDPA, chose to repeal § 106(a)(10), which previously provided habeas review. In so doing, Congress' intent to limit the judiciary's habeas review jurisdiction over aliens was made evident.

The solicitor general has asked the Supreme Court to resolve this issue, which other circuit courts of appeals have taken up as well: on November 18, 1998, the government petitioned for certiorari review of *Goncalves*.

VIII. Detention

Given the fact that immigration detention continues to be a growth industry,[16] fiscal year 1998 witnessed unprecedented growth in the proportion of resources allocated by INS to the detention and deportation functions. Compared to three years earlier, bed space nearly tripled from 6,600 beds to 16,000 beds in 1998. Criminal aliens occupied 9,600 of these beds, or sixty percent of the total available bed space. INS spent $733 million during the last fiscal year to accommodate this expansion. Even though INS efforts resulted in the construction of new facilities and the expansion of existing service processing centers and contract detention facilities,[17] the drastic increase in bed space is primarily due to contracts with local governments nationwide to lease available jail space.[18]

The detention and removal of criminal aliens continues to top INS' enforcement priority list. IIRIRA significantly changed the detention and release provisions of the act. Specifically, these provisions require the mandatory detention of aliens convicted of multiple criminal convictions, controlled substance violations, firearms offenses, espionage, sabotage, treason, terrorism, and aggravated felonies.[19] In addition, many non-criminal arriving aliens seeking admission must be detained with very few exceptions for parole. Thus, pursuant to IIRIRA, many aliens, criminal or not, are ineligible for bond or parole pending their removal hearing. Moreover, IIRIRA requires INS to detain many of these aliens for an additional ninety days after receiving a final removal order, while attempting to remove them to their countries of nationality. Many of the detainees cannot be removed due to either a lack of diplomatic relations with their home country or refusal by the home country to accept their nationals. Thus, numerous serious criminals from countries such as Cuba and Vietnam are indefinitely detained.[20] Currently, INS detains 3,500 such individuals, and their numbers are growing as new aliens continue to enter INS custody daily.

The Transition Period Custody Rules (TPCR), contained in § 303(b) of IIRIRA, temporarily suspended INS' mandatory detention obligations under § 236(c)(1). TPCR, enacted on October 9, 1996, and later extended on September 29, 1997, provided for the release of otherwise

16. *See* Arthur Helton, *A Rational Release Policy for Refugees: Reinvigorating the APSO Program*, INTERPRETER RELEASES, Vol. 75, no. 19, May 18, 1998, at 685.

17. Of particular note is the recently opened 450 bed detention center located in Batavia, New York. This facility represents the first detention facility actually built by the INS.

18. *See Immigration and Naturalization Oversight, Testimony Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary* (1998) (testimony of Doris Meissner, Comm'r, I.N.S.) *available in* 1998 WL 18089535.

19. *See* INA, *supra* note 12, § 1226.

20. Reportedly, however, Vietnam proposed an agreement with the United States some time ago to address this issue and has never received a response.

mandatorily detained aliens at the discretion of the attorney general. Specifically, under TPCR, the attorney general could release unreturnable detained legal permanent residents or aliens if they do not pose a danger to the safety of persons and of property, and are likely to appear for future scheduled proceedings.[21]

TPCR was created to allow INS time to expand available detention space in anticipation of IIRIRA's increased detention requirements. Nonetheless, when the two year TPCR period expired on October 9, 1998, INS remained unprepared to meet the burdens imposed by § 237 of the Act. At the outset, INS estimated that post-TPCR numbers of mandatorily detained immigrants would increase from 16,000 to over 34,000,[22] and the cost of accommodating this increase would exceed one billion dollars annually. On January 8, 1999, INS announced that due to unforeseen funding constraints, total available bed space for fiscal year 1999 was only 13,512 beds.

In an effort to manage the considerable increase in mandatory detainees, INS issued revised preliminary detention guidelines on October 9, 1998. The guidelines acknowledged that total compliance would not be possible and thus required regional director notification only if less than eighty percent compliance was possible. In addition, the guidelines established categories to prioritize the detainees: (1) required, (2) high priority, (3) medium priority, and (4) lower priority. Individuals in the required category would receive priority when INS detention space became available. If space was not available to house these individuals, INS officers had to pursue alternate options, such as acquiring additional detention space or funds locally, transferring the alien to another INS region or district, or, as a last resort, creating space by releasing a lower category alien. If no detention space was available nationwide, lesser priority detainees, presumably non-criminal aliens, had to be released to create space.

This priority approach was revised in a January 8, 1999, memorandum that reclassified the earlier four categories, allowing for the release of once mandatory detainees. According to the memorandum, the reclassification was because the detention issue threatened to place INS into an anti-deficient situation, requiring INS to spend beyond its annual budget. The memorandum permitted the release of "criminals in proceedings who are subject to required detention."[23] Factors to be considered in assessing the viability of such release include the number and type of convictions, length of incarceration, history of violence, evidence of rehabilitation, and other relevant factors.[24] Likewise, criminals with final orders of deportation, exclusion, or removal when removal is not imminent, would be eligible for release under orders of supervision. However, the release of known or suspected terrorists was unequivocally forbidden.[25] In response to congressional pressure, however, INS subsequently announced that it will not release any criminal aliens.

The Detention Watch Network, which consists of over 100 NGO organizations deeply concerned about the rapid increase over the past few years in the number of immigrants detained by INS and serious weaknesses in oversight and accountability, issued major policy recommendations to the attorney general this year. The network is urging the Justice Department to appoint a high level monitor with responsibility for oversight of the entire detention system,

21. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C.S. § 1226(c)(2) (Law. Co-op. 1997), *as amended by* Act of Sept. 30, 1996, 65-66.

22. *See* NPR MORNING EDITION, Oct. 8, 1998, *available in* 1998 WL 3308970.

23. INS Memorandum on Detention Guidelines for FY 1999, January 8, 1999.

24. *See id.*

25. *See id.*

including county jails and holding areas used during secondary inspection. The recommendations draw attention to the need to develop alternatives to detention, particularly for vulnerable populations, ensure access to independent and meaningful rights information for all detainees, develop and enforce comprehensive standards covering all facilities in which immigrants are held, and ensure that the unique needs of children are addressed.

With respect to detention alternatives, the INS contracted with the Vera Institute of Justice in late 1996 to implement a three-year demonstration program—the Appearance Assistance Program—to increase appearance in Immigration Court and compliance with the law among aliens in removal proceedings. The program aims to address a combination of problems facing the INS. Detention facilities can hold only a fraction of individuals in removal proceedings, roughly 125,000 people at any given time; yet many of those who are not detained do not appear in court, and very few comply with removal orders. The INS asked Vera to develop and validate with research a community supervision program that would increase compliance with the legal process among those not detained, while ensuring more efficient use of available detention space. A research team will assess the impact of supervision on appearance rates and compliance, as well as the program's cost-effectiveness. While still preliminary, the data so far suggests that the detention of those properly screened is not necessary to ensure compliance with the removal process when appropriate supervision is available. The research report should be issued towards the end of 1999.

IX. Criminal Aliens

The INS removed over 56,000 criminal aliens in fiscal year 1998.[26] This represents a nine percent increase over fiscal year 1997's total of some 51,000. According to the INS, drug convictions accounted for forty-seven percent of the criminal alien removals. Criminal violations of immigration law accounted for fifteen percent of the removals, while burglary and assault each accounted for five percent. Mexican nationals made up seventy-eight percent (over 43,000) of the criminal removals.

The Board of Immigration Appeals (Board) issued several important decisions this year affecting criminal aliens. For the first time since its drastic revision in IIRIRA, the definition of "conviction," pursuant to § 101(a)(48) of the Act, was addressed by the Board. In *In re Punu*,[27] the Board held that Congress' expressly stated intent for enacting § 322 of IIRIRA was to "broaden the scope of the definition of conviction," and in so doing, encompass the various state mechanisms of ameliorating the effects of a conviction."[28] Section 101(a)(48) was broadened to include all aliens who have admitted to or been found to have committed crimes, regardless of specific state procedures for deferring adjudication. Of specific interest in this decision was Board Member Grant's concurring opinion, which opened the possibility of the future demise of the "final conviction" requirement previously adhered to by federal courts.

Further, in two decisions this year, the Board expanded the types and numbers of crimes categorized as crimes of violence and therefore aggravated felonies for immigration purposes. In *In re Magallanes*,[29] the Board found that felony driving under the influence, where the

26. *See* INS News Release, INS Breaks Previous Removals Record; Fiscal Year 1998 Removals Reach 171, 154 (January 8, 1999), *available at* <http://www.ins.usdoj.gov/public_affairs/news_releases/index.html>.

27. In re Punu, Interim Decision 3364 (B.I.A. 1998).

28. *See id.* at 4.

29. In re Magallanes, Interim Decision 3341 (B.I.A. 1998).

respondent was sentenced to two and one-half years incarceration, constitutes a crime of violence pursuant to § 101(a)(43)(F) of the Act. Likewise, in *In re Palacios*,[30] the Board found that arson in the first degree, where the respondent received a term of imprisonment of seven years, constitutes a crime of violence. In both cases, the Board utilized the categorical approach, set forth in *Matter of Alcantar*,[31] to determine the federal definition of a crime of violence as contained in 18 U.S.C. § 16(b). Not only must the crime be a felony, but more importantly, the nature of the crime, as elucidated by the generic elements of the offense, must present a risk of physical force against the person or the property of another. In short, offenses under 18 U.S.C. § 16(b) all could potentially "result in harm." In both *Magallanes* and *Palacios*, the Board found DWI and arson, respectively, to be crimes of violence under the *Alcantar* approach. In so finding, the Board held that both crimes, at the very least, pose an incontrovertible danger to the persons and property in close proximity to the illegal activity.

Finally, despite their seemingly restrictive approach towards criminal aliens this year, the Board's *en banc* decision in *In re S-S-*,[32] provided some flexibility in cases where criminal aliens seek withholding of removal. The decision changed the method by which the Immigration Court should determine what constitutes a particularly serious crime. Prior to IIRIRA, *Matter of Q-T-M-T-* governed, which established the rebuttable presumption that an alien's conviction of an aggravated felony, where a sentence of less than five years was imposed, constitutes a particularly serious crime under § 241(b)(3)(B) of the INA.[33] The Board found that IIRIRA granted the attorney general discretion to determine the particularly serious nature of a crime when the aggravated felony conviction results in incarceration for less than five years. The Board rejected a categorical approach to classifying certain crimes as particularly serious in favor of a case-by-case determination that considered the facts and circumstances of each case.

X. Expedited Removal

On March 31, 1998, the General Accounting Office (GAO) issued the first government report on the expedited removal law that Congress adopted in 1996. The study reported on the first seven months of implementation: April 1, 1997, through October 31, 1997.

During this period, about 29,200 aliens were placed into the expedited removal process. INS inspectors issued about 27,800 removal orders, and as of December 1997, almost all of the aliens issued a removal order had been removed from the United States. Most of these aliens had attempted to enter the United States through ports-of-entry along the southern border with Mexico.

INS inspectors referred some five percent (about 1,400) of the aliens to credible fear hearings. Asylum officers completed interviews with approximately 1,100 of these asylum seekers and found that seventy-nine percent had a credible fear of persecution. Immigration judges received almost 200 cases to review asylum officers' negative credible fear determinations. The Immigration judges affirmed these determinations in five out of every six cases. Over the initial seven month period, then, eighty-three percent of those referred for determinations demonstrated a credible fear of persecution and were allowed to proceed to the normal process in Immigration Court. The GAO study indicates, then, that the new gatekeeping process sends almost all

30. In re Palacios, Interim Decision 3373 (B.I.A. 1998).
31. In re Alcantar, Interim Decision 3220 (B.I.A. 1994).
32. In re S-S-, Interim Decision 3374 (B.I.A. 1999).
33. *See* In re Q-T-M-T, Interim Decision 3300 (B.I.A. 1996).

identified asylum seekers through to regular asylum hearings. GAO did not investigate, and no information is available, however, as to whether INS inspectors have identified all asylum seekers in the first instance and referred them for a credible fear interview. The INS has refused requests from researchers to study this part of the new system.

At the beginning of 1999, INS announced that the Service removed over 76,000 aliens through expedited removal proceedings in fiscal year 1998. Most removals occurred at the Southwest border land ports-of-entry, with the majority—almost 41,000—taking place in San Diego.

XI. U.N. Issues Guiding Principles on Internal Displacement

Internal displacement, affecting some twenty-five million people worldwide, is increasingly recognized as one of the most tragic phenomena of this age. Forcibly uprooted from their homes by violent conflicts, gross violations of human rights and other traumatic events, internally displaced persons (IDPs) are just like refugees except that they remain within the borders of their own countries. Responsibility for the protection of IDPs rests largely with national governments and local authorities. Given the growing numbers in recent years, however, the U.N. Secretary-General appointed a special representative to study the causes and consequences of internal displacement, the status of the internally displaced in international law, and the extent of the coverage accorded them within existing international institutional arrangements and ways in which their protection and assistance could be improved.

In February, the special representative, Francis M. Deng, issued a set of *Guiding Principles on Internal Displacement*. Based on existing international humanitarian law and human rights instruments, the principles are to serve as an international standard to guide governments as well as international humanitarian and development agencies in providing assistance and protection to IDPs.

The principles identify the rights and guarantees relevant to the protection of the internally displaced in all phases of displacement. They provide protection against arbitrary displacement, offer a basis for protection and assistance during displacement, and set forth guarantees for safe return, resettlement and reintegration.

The *Guiding Principles* are intended to be both educational—raising the level of public policy awareness as to standards affecting IDPs—and practical, to be applied by governments, international agencies, and non-governmental organizations in the field. In order to make the Principles most useful to field staff, a handbook translating the principles into actions is expected to be issued in 1999.

XII. Torture Convention Developments

The United Nations Convention Against Torture was signed by the United States in October 1988 and entered into force in 1994. Despite several unsuccessful congressional attempts at passing implementing legislation in previous years, on October 21, 1998, the president signed into law legislation which requires that "not later than 120 days after the date of enactment of this act, the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States

Senate resolution of ratification of the Convention."[34] On February 19, 1999, the Department of Justice issued an interim rule implementing procedural measures to ensure U.S. compliance with the convention's non-refoulement (non-return) provision. The new rule places jurisdictional authority to assess the applicability of article 3 in most removal cases to EOIR, replacing the INS pre-regulatory administrative process. The new rule creates two distinct forms of relief, namely, withholding of removal and deferral of removal.

Upon determination by the Immigration Court that an alien is more likely than not to be tortured in the country of removal, the alien will be entitled to protection under the Convention against Torture. Under § 208.16(c) of the new rule, such an alien would be eligible for withholding of removal relief, much like 8 C.F.R. § 208.16(b) provides in the persecution context. In fact, the ratification history of the Torture Convention itself makes clear that the standard of proof for Torture Convention withholding of removal is to be identical to that which currently exists for § 241(b)(3) of the INA (non-refoulement in the persecution context).

However, applicants for Torture Convention withholding of removal would also be subject to the mandatory bars to withholding contained in § 241(b)(3)(B) of the INA. An alien who is determined by the court to be eligible for relief pursuant to the Torture Convention, but who is barred from such relief pursuant to § 241(b)(3)(B), would still be eligible for the lesser relief of deferral of removal.

While it is too early to tell what the practical differences are between withholding and deferral of removal, the interim rule provides some guidance as to the distinguishing characteristics these forms of relief possess. First, an order deferring removal to a particular country will not alter INS authority to detain an alien based on security or criminal related grounds. Therefore, serious criminal or terrorist aliens may be detained indefinitely until removal becomes possible under the Torture Convention. Second, § 208.17(d) provides for a streamlined termination of deferral of removal procedure when it comes time to remove an alien from the United States. At any time, the INS District Counsel may move the Immigration Court to schedule a termination hearing. This request will not have to follow the procedural strictures of a motion to reopen, as would be the case for reopening a withholding of removal case. The Service's request will be granted and a termination proceeding will be scheduled to determine if sufficient conditions have changed to warrant a return of an alien. Finally, deferral of removal may be terminated at the alien's written request pursuant to § 208.17(e).

The interim rule also provides for ways in which an alien subject to expedited removal and administrative removal may seek withholding or deferral relief pursuant to the Torture Convention. In the expedited removal context, an arriving alien who expresses a fear of being tortured will be referred to an asylum officer who will evaluate whether or not that alien has a credible fear of returning to his country. If the asylum officer determines that an alien in fact does have a credible fear, the case is referred to an Immigration judge for a hearing on the merits of the Torture Convention claim. Similarly, if no credible fear is found to exist by the asylum officer, the alien can appeal this decision to the Immigration Court for expeditious review.

The process for administrative removal is very similar to that of expedited removal. For those aliens who are not legal permanent residents and who have committed aggravated felonies, opportunity will be given to express a fear of returning to their home countries. Such claims will be referred to an asylum officer, who will make a determination as to whether or not a

34. *See* Omnibus Act, *supra* note 1, § 2242(b).

"reasonable" fear has been asserted. Since aliens in administrative removal proceedings are *per se* barred from the relief of asylum, and the eligibility standard for withholding relief is higher than that for asylum, this screening standard is higher than that for expedited removal. A positive determination by the asylum officer will then be forwarded to the Immigration Court to determine if the alien is eligible for relief pursuant to withholding or deferral of removal. Either the alien or the Service may appeal the Immigration judge's decision about eligibility for withholding or deferral of removal to the BIA. A negative determination by the asylum officer can be appealed to the Immigration Court for expeditious review.

XIII. INS Issues Guidelines for Children's Asylum Claims

On International Human Rights Day (December 10, 1998), the INS issued what one NGO called "historic" guidelines designed to make the asylum process sensitive to the unique needs of children. The United States became only the second country in the world to adopt such special procedures.

The guidelines recognize that "human rights violations against children can take a number of forms, such as abusive child labor practices, trafficking in children, rape, and forced prostitution." Special attention is paid to "child soldiers," children under the age of fifteen who are recruited into military operations. The guidelines also recognize that children experience persecution differently from adults and have special needs when it comes to presenting testimony at the asylum interview. For years, the United States has been criticized for running an asylum system where one size fits all. According to one of the leading critics, the Women's Commission for Refugee Women and Children: "The special vulnerability of children and recognition of their unique needs have largely gone unheeded. As a result, children have been forced to overcome the same complex and legalistic procedures and barriers as their adult counterparts. Fortunately, with these guidelines, this is about to change." The women's commission, together with other NGO's, UNHCR and experts, collaborated with INS in developing the Children's Guidelines.

The guidelines lay out procedural, evidentiary and legal standards that take into account the limited capacity of a child to present an asylum claim, while at the same time ensuring that the child's voice is heard throughout the process. All asylum officers will receive training geared to help them use the new guidelines and develop their awareness of children's and cultural issues. The INS Resource Information Center (RIC) will also issue country conditions information to inform asylum officers of the legal and cultural situation of children in their countries of origin, on the incidence of exploitation and other victimization, and on the adequacy of state protection afforded to children.

To ensure that the child's best interests are met, the guidelines allow a trusted adult to accompany and participate with the child at the asylum interview. The guardian's role is to bridge the gap between the child's culture and the asylum interview, to assist the child psychologically, and serve as a source of comfort and trust for the child. The guidelines encourage the asylum officer to allow the trusted adult to help the child explain his or her claim, and, at the same time, ensure that the child has the opportunity to express him or herself. While the INS guidelines do not mandate the appointment of a trusted adult, experts believe that the guardian role is essential to make the asylum process work for the child. The women's commission is asking the INS to develop a corps of professionals with child welfare experience and familiarity with children asylum seekers' cultures, to be lodged outside the INS with an appropriate NGO or in another Justice Department branch.

The Executive Office for Immigration Review (EOIR) has not yet adapted the guidelines to its own adjudication process, a potential problem since many children's cases are decided by Immigration judges. Also, there are no comparable guidelines for INS officers involved in other activities, such as apprehension, investigations, detention and removal, though such officers have contact with children.

The guidelines build upon the precedent-setting guidelines issued by Canada in 1996 and the model guidelines issued by the U.N. High Commissioner for Refugees in 1997.

XIV. Representation and Rights Presentations

The vast majority of aliens in proceedings continue to be unrepresented. Yet representation often makes the difference in the success of a claim. In asylum cases, for example, represented cases are three times more likely to succeed than pro se ones. Furthermore, in excess of eighty percent of those who fail to appear at their asylum hearings lack representation.

Concerned about the effectiveness and efficiency of Immigration Court proceedings, EOIR has initiated steps to begin addressing the consequences of a lack of representation. In June, EOIR selected three organizations for a pilot project to provide legal rights demonstrations to unrepresented aliens in Immigration Court proceedings. The pilot program will demonstrate and measure the impact of rights presentations in terms of efficiency and effectiveness.

The pilot is modeled after the Florence Immigration and Refugee Rights Project in Florence, Arizona. For years, the project has educated detained aliens about their rights and provides a triage system to secure representation for those with a likely avenue for relief. The project has been recognized for its success and assistance in moving cases through the system while enabling aliens to become aware of their rights and legal options. Many inside and out of government believe that the project reduces alien detention time, expedites removal by decreasing unnecessary immigration court time, and increases court efficiency. Representation also decreases anxiety and behavioral problems among detainees.

The three organizations implementing the pilot project are the Catholic Legal Immigration Network (at the San Pedro detention facility near Los Angeles), the American Bar Association Fund for Justice and Education, the Center for Immigration Law and Representation (in Harlingen, Texas), and the Florence Immigrant and Refugee Rights Project.

In addition, EOIR has created the position of pro bono coordinator to develop and coordinate a nationwide program to promote and facilitate pro bono efforts before the Immigration Court and the BIA. A search to fill that position was launched in the Spring of 1997 but has not yet been completed.

XV. BIA Streamlining Proposal

The EOIR issued a proposed rule in September to permit the Board of Immigration Appeals to affirm immigration judge orders (including orders removing aliens) by the decision of a single BIA member, without any opinion.

The proposal came as the board attempts to deal with a burgeoning caseload and significant backlog. In 1984, the board received fewer than 3,000 cases and consisted of five members. In 1994, it received more than 14,000 cases. The next year, the attorney general increased the board's size to twelve members, and in 1996 to fifteen members. In 1997, more than 25,000 new appeals were filed.

The public comments filed in response to the proposal included alternative ways that the board could deal with the increased caseload and backlog. Many commenters noted that the

"summary affirmance" proposal combined two very different streamlining methods: eliminating written decisions in many cases, and substituting single members for three-judge panels in such cases. These commenters argued that written decisions are central to appellate deliberation and urged EOIR to continue the practice of providing a statement of reasons that addresses the appellant's contentions. In the interest of streamlining the appellate process, they suggested that the statement of reasons need not be as elaborate as board decisions often are—including a full statement of facts, analysis of the law, and citations to authority. The most important aspect of the decision, they argued, was addressing the appellant's contentions, or in the case of unrepresented aliens, any obvious errors. To further address the need for streamlining, commenters also suggested that individual members be assigned to decide each case. If the case appeared to the single member to be of considerable significance, the member could ask that members consider the matter jointly.

EOIR has not yet issued a final rule. In a separate move this year, the attorney general authorized the expansion of the BIA to eighteen permanent members.

XVI. Adjustment of Status Backlogs Continue to Grow Considerably

INS faces very significant backlogs in the processing of adjustment of status applications. The most recent official figures demonstrate the problem: pending applications have increased almost six-fold, from 121,000 at the end of fiscal year 1994 to 699,000 at the end of fiscal year 1997.[35] (INS has not published any figures for FY 1998). The consequences: INS attributes a thirteen percent decrease in the number of aliens granted legal permanent residence in FY 1997 primarily to these processing problems, not to a decline in the demand to immigrate. About fifteen percent of all adjustment of status approvals came from the family preference categories during fiscal years 1995-97.[36] Failure to process family preference adjustments does not generally decrease legal immigration in these categories because the Department of State, which regulates immigration under the preference system to match the annual limits as closely as possible, compensates by issuing visas to aliens abroad on the waiting lists. However, since most applicants for employment preferences are in the United States and seeking adjustment, backlogs at INS have a profound effect on these categories. The backlog also affects immediate relatives, for whom there are no numerical limits on adjustment.

To make matters worse, INS reportedly suspended the processing of adjustment applications filed after April 1, 1998. The effect of this suspension on top of the backlog is that adjustment processing times generally have doubled from the end of calendar year 1997 to the end of calendar year 1998. Immigrant petition processing has also slowed down considerably.

XVII. Naturalization Developments

The backlog in naturalization applications numbered about two million by the end of fiscal year 1998. According to the INS, processing time came down from twenty-seven to twenty-four months. In order to address this backlog and reduce the wait to six months or less, INS requested significant reprogramming funds from Congress and redesigned the naturalization process.

In the Omnibus Appropriations for fiscal year 1999, Congress granted an INS request to reprogram $171 million for citizenship processing that had been previously allocated for other

35. INS, ANN. REP.: LEGAL IMMIGR., FISCAL YEAR 1997, at 2, *available at* <http://www.ins.usdoj.gov>.
36. *See id.* at 3.

Justice Department and INS purposes. The funds will be used to hire 200 more adjudication officers and additional support staff to serve as dedicated backlog reduction teams; to set up a nationwide customer service telephone center to provide information on benefits, procedures, and individual case status; to centralize record keeping and files; to carry out a number of new naturalization re-engineering initiatives; and to reduce backlogs in certain non-naturalization benefits applications. Naturalization backlog reduction efforts will be focused in the five cities with the largest backlogs: Los Angeles, New York, Miami, San Francisco, and Chicago.

INS' redesign efforts, developed with PricewaterhouseCoopers, resulted this year in a new single-source guide for applicants, an in-house fingerprinting process, a direct-mail service center program for processing applications, and special bar-code software for applications that reduces manual data entry at the service centers.

On October 13, 1998, INS fees for most immigration benefits increased. The fee increase for citizenship applications was postponed until January 15, 1999, to allow the agency to demonstrate sustained progress on reducing the backlog of citizenship cases. The naturalization fee more than doubled, going from $95 to 225. Advocates criticized the fee increase as being inappropriate until such time that the INS can and does provide services commensurate with such an increase.

XVIII. Initial Effects of New Affidavit of Support Requirements

While neither INS nor the State Department have issued public statements regarding the initial effects of the new affidavit of support requirements, unofficial reports indicate a significant increase in denials of adjustment and immigrant visa applications. Many sponsors of intending immigrants whose applications were filed after December 18, 1997, have not been able to meet the new income requirements (125 percent of the federal poverty line for both their own families and the sponsored immigrant). In addition, numerous problems have arisen, particularly overseas, in completing the new forms properly and providing the newly required documentation to satisfy the income requirements. Since no official statements have been made by the agencies, however, it is not clear how many intending immigrants have been affected so far by IIRIRA's affidavit of support provisions.

XIX. Social Rights of Immigrants

Some of the most profound changes to occur in immigration policy found their way into law through the welfare reform legislation passed in 1996. The Personal Responsibility and Work Opportunity Reconciliation Act (Welfare Reform Act), in combination with IIRIRA, reduced substantially the access of legal immigrants to public benefit programs relative to the access available to citizens. In 1998, Congress continued to ameliorate certain provisions affecting those who had been receiving benefits prior to the 1996 law. All of the reversals, however, pertain to retroactive application of the new standards to immigrants in the United States at the time of passage. The significant derogation of the social rights of legal immigrants entering now and in the future has not changed.

Until 1996, no federal benefit program denied eligibility solely on the basis of alienage to permanent resident aliens. The 1996 reforms in the welfare system reduced significantly the eligibility of immigrants for public benefits. More specifically, the welfare act made legal immigrants ineligible for Supplementary Security Income (SSI) and food stamps until citizenship or the immigrant has worked forty qualifying quarters. The act also made legal immigrants ineligible for other means-tested benefits during their first five years after entry. Unlike SSI and food

stamps, many of these other programs involve a match of federal and state funds. The total cuts amounted to some $24 billion of assistance.

In 1997 and 1998, some of the most egregious provisions, specifically retroactive application of the new rules to persons already receiving assistance, were reversed. The improved budget climate enabled consideration of these changes. In 1997, Congress restored nearly $12 billion in age and disability benefits (SSI) to those legal immigrants who entered before August 22, 1996, the enactment date of the welfare reform law. In 1998, Congress restored food stamp benefits for certain groups of immigrants. The $818 million five-year package provided food stamp benefits for 250,000 persons, or about one-quarter to one-third of those who lost benefits as a result of welfare reform.

The 1998 changes restored food stamp benefits to: (1) elderly immigrants in the United States and sixty-five or older as of August 22, 1996; (2) immigrants residing in the United States as of August 22, 1996, who meet the food stamp program's definition of disabled, regardless of when they become disabled; (3) immigrant children under age eighteen who were in the United States as of August 22, 1996; and (4) Hmong and highland Lao tribe members who assisted the U.S. armed forces during the Vietnam War and their close family members. The law also extended from five years to seven the exemption to the lifetime bar for refugees, asylees, those granted withholding of deportation, Cuban/Haitian entrants, and Amerasians. Immigrants benefitting under the changes became eligible for restoration on November 1, 1998.

XX. INS Restructuring

In its final report, the U.S. Commission on Immigration Reform proposed a major executive branch reorganization of immigration functions—to have each responsible agency focused exclusively on either service, enforcement, employment standards, or appeals of administrative decisions. By placing the service and enforcement functions at two different agencies, the proposal would have effectively eliminated the INS District Office system. The proposal triggered significant activity in 1998. The Clinton administration proposed a reorganization of INS that would separate the service and enforcement functions within the agency. The proposal was developed with Booz Allen and Hamilton, a management consulting firm. The INS has created an Office of Restructuring and has contracted with PricewaterhouseCoopers, a management consulting firm working on re-engineering the naturalization process, to help the office develop a detailed implementation plan. Congress held a number of hearings on various aspects of restructuring in 1998, and several bills to reorganize INS were introduced in the House. Senate and House leaders have stated that they intend to take up INS restructuring legislation early in the 1999 session.

XXI. Conclusion

This snapshot of major developments in 1998 is quite mixed. With regard to forced migration policies, the Haitians finally received fair treatment after many years of disparities. The executive branch showed itself capable of responding quickly to a Central American emergency with the temporary protection tools the law currently offers. The United States became only the second country in the world to adopt special asylum procedures for children, thanks to the INS and the NGOs that worked closely with the Office of International Affairs. Yet we still have a law that restricts access for refugees to seek protection if they present themselves at our ports of entry. Internationally, the issuance of *Guiding Principles on Internal Displacement* brought much needed legal attention to the situation of the most neglected forced migrants. In terms

of legal immigration policies, the trend continues to be in the direction of increased skilled labor. But problems with the implementation of legal immigration policies have worsened: adjustment of status is now seriously backlogged, in part related to problems experienced in the naturalization program and in part a consequence of the Service's shifting of personnel resources to address the naturalization backlog. Congress shows no signs of changing the fundamental philosophy it adopted during welfare reform, that legal immigrants should have fewer social rights than citizens. The intended and unintended effects of IIRIRA and AEDPA are now being felt with regard to mandatory detention and criminal alien policies. At the same time, the INS is piloting important alternatives to detention. Just how far judicial review can be stripped away is still unclear, yet the BIA has proposed a streamlining measure that eliminates meaningful review of many Immigration Court decisions. In the same breath, EOIR is trying to improve the representation system permitted under current law. In short, while some of our policies and programs demonstrate promise, commitment, and professionalism, many continue to exhibit contradictions, ambivalence, and incoherence in the U.S. approach to immigration and immigrant policy.