Introductory Survey

Overview of Legislative, Administrative and Judicial Changes in Immigration Law During 1988

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I. Introduction

During 1988, the practical consequences of the Immigration Reform and Control Act (IRCA) of 1986 continued to provoke a great deal of judicial and legislative activity. As application deadlines for legalization approached, several Congressional attempts were made to extend the filing period, citing both INS failures to inform the target community of changes in eligibility requirements and the uncertainties of filing requirements resulting from pending litigation. While legislative attempts were ultimately unsuccessful, several federal district court decisions did extend the time period for certain applicants affected by judicially-mandated reversals of INS policy.

These extensions occurred despite the Supreme Court's ruling in Pangilinan v. INS, 486 U.S. —, 108 S. Ct. 2210 (1988), in which the Court declared itself powerless to extend a statutory deadline in another context—that of postwar naturalization for Philippine nationals who had been on active duty with U.S. forces in World War II. While the district court decisions emphasized that equitable relief should be available to IRCA applicants (see, e.g., Catholic Social Services v. Meese, — F. Supp. —, Civ. No. S-86-1343 LKK (E.D. Cal., Aug. 11, 1988), a recent Supreme Court holding has reaffirmed that statutory and administrative deadlines should be considered final even though applicants receive incorrect adjudications through their provisions. Pittston Coal Group v. Sebben, 486 U.S. —, 109 S. Ct. 414 (1988). Although Pittston concerned benefits for miners suffering from black lung disease, its emphasis on res judicata may serve to limit equitable relief in the immigration context as well.

Provisions of the Immigration Marriage Fraud Act and final regulations implementing it (published in August of 1988) continued to face constitutional challenges, the majority of which were unsuccessful. 1988 also saw the first litigation under employer sanctions and anti-discrimination sections of IRCA.

For aliens seeking political asylum, however, the Board held that convictions for a "particularly serious crime" are not sufficient grounds to deny the applicant a hearing on the merits of his or her claim of persecution. Regulations which the INS had proposed, eliminating asylum hearings before an Immigration Judge, while revised, continued to be the subject of considerable protest, postponing the publication and implementation of final procedures. Asylum litigation in 1988 centered on alternate definitions of "political opinion," particularly in the case of refugees objecting to forced conscription.

In non-immigrant decision making, INS final regulations concerning intracompany transfers (L-1 visas) so narrowed the class of potential beneficiaries that some experts predicted that the number of applications will be considerably reduced in FY 1988. In contrast to its restrictive interpretation of the L-1 class, the INS broadened entry possibilities for other non-immigrants, allowing mentally retarded persons to obtain non-immigrant visas under specific conditions.

Finally, various legislators' reintroduction of immigration reform bills in 1988 showed that the impetus to provide for "independent" or "seed" immigrants has not receded.

II. Legislative Developments

Congress acted on several pieces of legislation which were either pending or due to expire as of last year's Immigration and Nationality Law Review.


Section 901 of the 1987 Foreign Relations Authorization Act, Pub. L. No. 100-204, concerns the rights of aliens under the First Amendment. As mentioned in last year's review, this section temporarily (for FY 1988 and FY 1989) prohibits the U.S. government from deporting, excluding, or denying a visa to aliens whose beliefs, statements or associations would be protected by the U.S. Constitution if engaged in by U.S. citizens in the United States. The enactment of section 901 was instrumental in the
First Circuit's decision in *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988), which overturned the State Department's denial of a visa to Hortensia de Allende, the widow of slain Chilean president Salvador Allende. This case and others implementing § 901 will be discussed under *Exclusion and Deportation* (see Section VII below).

Senate Bill 2757, introduced in 1988, would have made the section 901 prohibitions permanent. The final version of this legislation, enacted Oct. 1, 1988, applies only to non-immigrant visa seekers; moreover, it is not permanent, but only extends for two more fiscal years, to January 1, 1991. (H.R. 4637, amendment to the Foreign Aid Appropriations Bill, Pub. L. No. 100-461, 102 Stat. 2268).

Representative Barney Frank (D-MA) also introduced a bill which would have permanently changed ideological grounds for exclusion, revising selected portions of INA §§ 212 and 241. The House Judiciary Committee approved Rep. Frank's bill, the Immigration Exclusion and Deportation Amendments of 1988, as H.R. 4427 on June 22, 1988, but the proposed changes were ultimately not enacted.

After considerable discussion, Congress enacted historic legislation providing for an official apology and monetary reparations to persons of Japanese descent who were forced into detention camps during World War II. The Civil Liberties Act of 1988, which President Reagan signed on August 10, 1988, authorizes payments of $20,000 each to nearly 60,000 survivors of the camps. It also allots $12,000 each to Aleut Indians who were removed from their homes in the island of Attu after the Japanese attacked it in 1942.

Survivors of the internment camps were not successful in the courts, however. In *Hohri v. United States*, 109 S. Ct. 307 (1988), *cert. denied*, the Court declined to review the dismissal of a suit for damages brought by 19 individual survivors of the camps and a Japanese-American organization. The district court had held that the suit was barred by the statutes of limitations, in 586 F. Supp. 769 (D.D.C. 1984), and the court of appeals affirmed, 847 F.2d 779 (Fed. Cir. 1988).

For present and future immigrants, one of the most significant legislative acts of 1988 was the Anti-Drug Abuse Act, Pub. L. No. 100-690, which was signed by President Reagan on November 14, 1988. This measure creates an expedited deportation procedure for aliens convicted of "aggravated felonies" (that is, murder or trafficking in drugs or firearms). It also increases the penalties for illegal re-entries after deportation, and for certain other immigration-related offenses. See *Crime-Related Exclusions and Deportations* (Section VII.B) below for a detailed description of its provisions.
IRCA-related bills included a renewal of attempts to provide for family fairness in the legalization process. Rep. Roybal proposed an amendment to the omnibus Appropriations Bill to allow IRCA-ineligible family members to be granted voluntary departure status. This amendment was deleted by House-Senate conference, but Roybal vowed to re-introduce it in the next session of Congress.

Attempts to extend the IRCA deadline present a similar picture of much debate over measures which ultimately failed to be enacted. Beginning with Rep. Schumer's H.R. 3816 (introduced in December of 1987), several bills were proposed, extending the deadline for legalization for another year, for Special Agricultural Workers (hereafter, SAWs) as well as other applicants. A House version for SAW applicants passed by 12 votes in April of 1988, but none of the Senate versions got that far. These were: S. 2002, S. 2015, and finally S. 5308, which an announced filibuster prevented from reaching a full vote before the May 4, 1988 deadline for amnesty applications.

Proponents had argued that extensions were necessary because the INS had not publicized the opportunity for legalization sufficiently and moreover, the INS had changed several important requirements since the 1986 passage of IRCA. The bill's supporters had also contended that more time was needed to inform the target community about liberalizations of the eligibility standards brought about by litigation since the passage of IRCA. (These cases will be discussed under Temporary Residence Issues, Section IV below).

Immigration reform legislation re-introduced in 1988 was very similar to the Kennedy bill (S. 1611) discussed in last year's Immigration and Nationality Law Review. Sen. Simpson, who had sponsored his own reform bill (S. 2050) met with Sen. Kennedy to draft a compromise bill, S. 2104, which passed the Senate by an overwhelming majority on March 15, 1988. This bill, like last year's version, proposed a reorganization of the preference system, allocating separate quotas for family-related and work-related immigrants, and adding an important new class of independent immigrants, whose entry would be determined by a point system.

In the House, Reps. Mazzoli and Rodino authored the "Legal Immigration Amendments of 1988" (H.R. 5115) in July of 1988, which contained very similar provisions. In an attempt to consolidate this legislation, the House Judiciary Committee's Subcommittee on Immigration, Refugees and International law held hearings on September 7 and 16, 1988. After the first hearing, Rep. Berman introduced yet another, similar bill: H.R. 5299 on Sept. 12, 1988. The final version of H.R. 5115, which the legislature approved on October 21, 1988, contained almost none of the more radical reform measures. The final version (1) allows foreign
nurses already in the U.S. five years on H-1 visas to extend their stay an additional year (until 12/31/89), (2) extends the NP-5 program of IRCA for another two years and (3) sets up a two-year pilot program to promote "diversity" in immigration.

Historically, both the NP-5 program and the diversity lottery reflect attempts to remedy what members of Congress have viewed as unfortunate side effects of the 1965 Amendments to the INA. The 1965 Amendments, in turn, reflect a rejection of the 1924 National Origins Act. The 1924 Act overwhelming favored Europeans; for example, 150,000 Europeans were allowed to immigrate to the U.S. each year, while Japanese immigration was completely prohibited. Moreover, certain European nations were given a much higher quota than others. The 1965 Amendments establishing a uniform quota of 20,000 for each nation in the Eastern Hemisphere, as well as the preference system for immigrant visas, were intended to correct these imbalances. Nevertheless, members of Congress have expressed some concern that, as a result, certain European nations have lost opportunities.

Under the pilot program, a random visa lottery, as in NP-5, would take place. However, the "diversity" lottery would not be restricted to countries "adversely affected" by the 1965 INA amendments. Rather, it would allow 10,000 immigrants each year from "under-represented" countries to receive visas, where any country who used less than 25 percent of the immigrant visas alloted to it in FY 1988 would be considered "under-represented." Interpreter Releases has noted that citizens of 162 countries are eligible to compete for immigrant visas under the new program. 66 Int. Rel. 34 (1989). The INS issued a proposed rule implementing the program on December 30, 1988. 53 Fed. Reg. 53,003 (1988).

Regarding refugees, several bills were introduced, like the Moakley-DeConcini Bill of last Congress, in an effort to gain temporary haven from deportation for Salvadoran and Nicaraguan refugees in the U.S. In the Senate, unsuccessful attempts included a revised DeConcini Salvadoran/Nicaraguan Refugee Protection Bill (S. 332) and a safe-haven provision introduced as an amendment to the Refugee Reauthorization Bill (S. 2605). In the House, Romano L. Mazzoli, Chairman of the immigration subcommittee of the House Judiciary Committee, and Rep. Hamilton Fish (R-NY) introduced H.R. 4329, a bill granting temporary safe haven to aliens whose countries have suffered a natural calamity or civil strife. This bill was approved by the House Judiciary Committee on May 3, 1988; however, it ultimately failed to be enacted.
III. Changes Affecting Non-immigrants

During 1988, INS regulations for H and L visas continued to be the focus of controversy, generating several legal challenges. The INS also implemented changes in its visa policy toward students and exchange visitors.

A. Changes Affecting Mentally Retarded Non-immigrants

On October 19, the INS adopted final regulations broadening admissibility for mentally retarded non-immigrants; previously only Canadians were eligible for a blanket waiver of this ground when seeking non-immigrant visas. 8 C.F.R. § 212.4(e). Observing that the waiver for developmentally disabled Canadians had not harmed the “public interest,” the INS rule, effective on the same day as published, allows all nationalities to apply for the waiver. Aliens entering pursuant to this waiver must be accompanied by a family member or guardian.

B. Changes Affecting Students

In accord with its new regulations of May, 1987 (8 C.F.R. §§ 214.2(f) and 214.3), the INS issued new operating instructions relating to student applications for extension of stay. These instructions state that all students who have been in one academic program or in student status for eight consecutive years must apply for an extension of stay to continue to remain on an F-visa in the U.S. In October, 1988, the INS began assessing penalties for late reapplication.

C. Developments Affecting H-visas

1988 witnessed three principal developments concerning H-1 visas: (1) several legal challenges to INS regulations on eligibility and time limits for such visas, (2) publication of a study addressing Congressional concerns about H-1 workers in the U.S. labor force, and (3) further Congressional postponement on final publication of INS guidelines (proposed in 1986) regarding the definition of “distinguished merit and ability” for H-1 purposes.

In 1987, INS regulations, for the first time, set a cap on the length of time an H or L visa holder could remain continuously in the U.S. After 5 years, 8 C.F.R. §§ 214.2(h)(10)(ii) and (i)(12) requires H or L non-immigrants to leave the U.S. for a year before a new H or L petition will be approved.

In February of 1988, Asea Brown Boveri, Inc. v. Meese, Civ. No. 88-0200C (D.N.M., Feb. 23, 1988) challenged this regulation, arguing that the regulation disrupted business and denied the company use of its key employees. The plaintiffs contended that the INS regulation presented
them with an impossible choice: either lose valuable employees or violate the immigration laws; thus, it was arbitrary and capricious.

Legal challenges were also brought against the definition of “professional” used by the INS for H-1 purposes. INS regulations state that only temporary workers of distinguished merit and ability will be qualified for H-1 visas. The 1986 proposed guidelines for H-1 eligibility incorporate INS case law, which has held that members of the professions are prima facie eligible. However, both the 1986 definition and INS decisions have rather narrowly interpreted who fits in the category of “professionals.”

In a stipulated settlement reached with Microsoft Corporation (Microsoft Corp. v. INS, No. C87-1371C (W.D. Wash., Mar. 15, 1988)), the INS agreed to grant an H-1 visa to a software market analyst enrolled in an 18-month training program with the company. The INS, at first, had denied such a visa, holding that this position was not a professional one and that the worker was not a professional, even though he had a bachelor’s degree in business administration and economics as well as work experience. The Administrative Appeals Unit (hereafter, AAU) stated that Microsoft had failed to establish that the worker qualified as a professional in any field. Microsoft argued that the worker was a professional economist. The settlement of the Microsoft case solved the H-1 problem for one particular worker, but may go no further in broadening the definition of “professional,” since both sides agreed that future visa petitions would be decided on the basis of the individual applicant’s circumstances.

In Hong Kong T.V. Video Program, Inc. v. Ilchert, 685 F. Supp. 712 (N.D. Cal. 1988), the court held that, according to INS regulations, an alien need not have a college degree to be considered a “professional” for H-1 purposes. The court found that the INS acted arbitrarily and capriciously in refusing an H-1 visa to a company president because he did not have a bachelor’s degree.

Even when the INS concedes that the worker is a “professional,” it may, nevertheless, deny him or her an H-1 visa on the grounds that the proposed employment in the U.S. will not be as a professional. In Mindsaye v. Ilchert, — F. Supp —, No. C846199SC (N.D. Cal., Dec. 11, 1987), despite the fact that the worker’s training (a bachelor’s degree in fashion design and work experience) would qualify him as a professional, the INS held that his position did not constitute a “profession” since he would be earning only $20,000/year in a business with only four employees. The federal district court reversed, holding that the size of the operation and the visa-seeker’s salary were insufficient reasons to reject his job as a professional one.
Final INS regulations concerning H-1 visas were postponed during 1987 until a study could be completed documenting the effects of H-1 workers on the U.S. labor market. During 1988, the INS commissioned separate studies of H-1 and L-1 visas by an independent management consulting firm. Results of these surveys indicate that H-1 and L-1 visa holders constitute a negligible percentage of the U.S. total work force. According to the study sample, approximately 3 percent of all the H-1 petitions approved in FY 1986 and 1987, the majority of H-1 entries were made by either nurses or entertainers. Contrary to concerns expressed by legislators, the study clearly demonstrated that H-1 holders in technical professions (nurses, computer professionals, accountants, and engineers) are not displacing U.S. workers. Nevertheless, H-1 holders tend to be concentrated in certain areas of the U.S. For example, 80 percent of the admissions for foreign nurses were for work in the New York area. Given the large vacancy rate for nursing positions in that region, the study concluded that even such a disproportionate concentration affected neither the salaries nor the number of nursing jobs available to U.S. workers in the area.

Although the study found no displacement of U.S. workers, members of Congress were apparently still not confident of the proposed H-1 regulations. In August, 1988, the Senate banned final publication of these regulations for another year, as a floor amendment to H.R. 4782, the Senate Appropriations Bill for the Departments of State, Justice and Commerce.

D. Continued Controversy over H-2A Workers

IRCA § 301(c) permits U.S. growers to import H-2A temporary workers subject to conditions imposed by the Department of Labor. DOL regulations require that employers of foreign laborers must pay them "adverse effect wages rates" (AEWRs), an enhanced rate of pay set by DOL in order to protect against depression of wages by foreign workers. Interim regulations published by DOL in June, 1987 used a novel method to calculate AEWRs—one that resulted in a 20 percent reduction in the required minimum wage.

While growers favored these regulations, as was to be expected, labor organizations opposed them and sued to prevent their implementation. As of last year's Immigration and Nationality Review, the AFL-CIO had won a temporary injunction prohibiting the implementation of the disputed regulations. AFL-CIO v. Brock, 668 F. Supp. 31 (D.D.C. 1987), but the growers had countered with an appeal for an emergency stay against the injunction. AFL-CIO v. Brock, No. 87-5258 (D.C. Cir., Aug.
The stay allowed DOL to continue issuing H-2A visas while the suit was pending.

On December 22, 1987, the D.C. Circuit Court of Appeals repudiated the arguments of both sides and remanded the case to the federal district court. *AFL-CIO v. Brock* — F.2d — , No. 87-5258 (D.C. Cir., Dec. 22, 1987). The court of appeals vacated the lower court's injunction, but agreed with the AFL-CIO that DOL had failed to provide a "reasoned explanation" for its policy change concerning the minimum wage rate.


**E. Changes Affecting L-visas**

The INS study of L-1 transferees, like the H-1 study, was motivated by concern that this group might be displacing U.S. workers or depressing wages. Neither of these effects was confirmed by the study. In addition, the INS had hypothesized that too many L-1 transferee visas were being issued to small firms, where the job duties of visa holders would not meet the extremely strict definition in 8 C.F.R. § 214.2(1)(1)(ii)B-D: an L-1 beneficiary must be continuing employment in an "executive" or "managerial" capacity, where his or her job duties require "specialized knowledge" such that this combination of skills cannot be duplicated by members of the U.S. labor force. Results of the survey provided scant support for the INS' hypothesis.

In *Matter of Sandoz Crop Protection Corp.*, Int. Dec. 3067 (Comm'rn 1988), the INS held that the employee did not meet the requisite "specialized knowledge" criteria, despite the fact that he knew the proprietary line of products patented by his company and would be using this knowledge in his position as marketing manager. In order to qualify, the INS maintained that the employee would not only have to have proprietary knowledge which he used in his job, but the employee's knowledge would have to "relate exclusively" to the petitioner company's patented proprietary interest. Commentators in the *Immigration Law Report* (7 *Immig. L. Rep.* 85, 88-89 (1988)) have observed that under this reading of the statute, the only truly qualified transferees would be those whose job duties are developing patented information (e.g., chemical formulas, proprietary software). The emphasis on exclusivity also tends to favor transferees of large companies with highly compartmentalized functions.
Emphasis on the exclusivity of "specialized knowledge" also led the INS to reject L-1 visas for four Dutch interior designers whom an international furniture retailer had planned to transfer to the U.S. The employees had extensive training and experience in setting up showrooms for the company's 10,000 products. Observing that at least 100 employees of the corporation had as much training and experience as the four proposed transferees, the INS held that they did not meet the "specialized knowledge" criteria. On appeal, in IKEA, Inc. v. INS, Civ. No. 87-2025 (D.D.C., Dec. 23, 1987), the federal district court stated that possession of "specialized knowledge" does not depend on how many other employees share this expertise. Rather, it depends on how available such knowledge might be among the U.S. workforce. Moreover, the INS erred in considering the potential pool of transferees, rather than the actual number for whom IKEA had sought L-1 visas. The court ordered INS to issue the requested non-immigrant visas to the four transferees, and, when it failed to comply, IKEA sought to hold the INS in contempt. Subsequently, INS issued the visas, and in IKEA, Inc. v. INS, Civ. No. 87-2025 (D.D.C., May 26, 1988), the court awarded IKEA attorney fees under 28 U.S.C. § 2412(d), the Equal Access to Justice Act.

On October 27, 1988, the INS issued a policy memorandum listing four attributes which comprise "specialized knowledge" for L-1 purposes. The proposed transferee must (1) have knowledge that is valuable to his or her employer's competitiveness in the marketplace, (2) be uniquely qualified to inform the U.S. employer about foreign business practices, (3) have knowledge which can only have been gained through considerable previous experience with the employer requesting transfer, and (4) have been used as a key employee abroad. These four factors are not congruent with those set forth in the Sandoz decision, leading to some confusion about which interpretation of "specialized knowledge" will be applied to future L-1 petitions.

F. Continued Debate on J-visas

On March 7, 1988, the Supreme Court denied certiorari in Slyper v. Attorney General, a case protesting the USIA's refusal to grant a waiver of the two-year foreign residence requirement for a J-visa holder, per INA § 212(e). The Court of Appeals had pronounced USIA decisions on this matter immune from judicial review and within the limits of agency discretion. Slyper v. Attorney General, 827 F.2d 921 (D.C. Cir. 1987).

On February 10, 1988, James Puleo, INS Assistant Commissioner for Adjudications sent a memo regarding program change applications by J-1 visa holders, in response to questions from Stanford University per-
Mr. Puleo stated that J-1 visa holders may not work for a new employer while the INS is adjudicating the change application. Instead, J-1s may continue with their old employer for up to 120 days while awaiting results from the INS. 8 C.F.R. § 274a.12(b)(15).

In 1987, the U.S. Information Agency (USIA) created a review panel to adjudicate disagreements between that agency and any other over whether a J-1 holder should be granted a waiver of the two-year foreign residence requirement. However, the panel became so overloaded with review requests that on October 31, 1988, the USIA announced that it will no longer accept individual aliens' requests for review of its decisions denying a waiver, except in very limited circumstances. Instead, the USIA will review such denials only if another agency makes the request.

IV. Temporary Residence Issues

In 1988, the INS interpretation of IRCA continued to be a major source of litigation, both for aliens seeking amnesty under § 245A as well as those trying to legalize their status under the SAW provisions (§ 210).

For 245A applicants, litigation centered about INS interpretation of four key phrases in IRCA: (1) "public charge," (2) "continuous residence," (3) "brief, casual and innocent absences," and (4) "known to the government."

For SAW applicants, major efforts went toward widening the FDA's interpretation of perishable crops establishing SAW eligibility and toward helping workers get the documentation they needed to prove eligibility.

As 1988 progressed and applicants received temporary resident status, an immediate, practical question arose: to which public benefits are such temporary residents legally entitled? IRCA § 245A(h) states that LTRs are disqualified from receiving certain public benefits for five years. The disqualification begins as of the date of the granting of LTR status and remains in force despite the fact that during the five-year period, an LTR may have become a permanent resident. Although some public benefits were listed in IRCA itself, INS proposed regulations of August, 1987 and October, 1988 (proposed 45 C.F.R. § 1626.3(c)(2)) listed many more, including legal services. These proposals were still the subject of considerable controversy at the end of 1988, and the final list remained to be determined.

In November 1988, the INS issued interim regulations governing the second stage of IRCA legalization, through which LTRs receive permanent resident status. These will be discussed under Permanent Residence Issues, Section V below.
A. Litigation on Key Phrases in the INS Regulations

During 1988, a number of class action cases succeeded in extending the application deadline for thousands of potentially eligible aliens under IRCA § 245A.

On the question of “public charge” excludability, Zambrano v. INS, — F. Supp. —, Civ. No. S-88-455 EJG (E.D. Cal., Aug. 9, 1988) challenged INS regulations interpreting the applicable IRCA provisions. 8 C.F.R. § 245a(1)(i) et seq. At the time IRCA was enacted, legislators were aware that many amnesty applicants would fall below the poverty line. For these applicants, Congress set up a “special rule” which states that if the person “demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance,” the fact that his or her current income is below the poverty line will not constitute a bar to legalization. IRCA § 245A(d)(2)(B). In Zambrano, plaintiffs argued that the INS was applying the special rule as an additional test for all applicants, contravening the generous intent of Congress. For example, the INS required applicants (regardless of their current income) to show that neither they nor any of their family members had ever received welfare benefits. The court agreed that the INS criteria were overly harsh and issued a preliminary injunction barring further use of the disputed regulations. The court also ordered that application deadlines be extended for two classes of aliens within the Ninth Circuit: those whose legalization applications were denied by reason of the disputed regulations, and those who were discouraged from applying because of the regulations.

In Hernandez v. Meese, No. S-88-385 LKK/JFM (E.D. Cal., Aug. 11, 1988), IRCA applicants challenged the INS interpretation of “continuous residence.” To be eligible for legalization under IRCA § 245A, an applicant must have maintained continuous “unlawful” residence in the United States since January 1, 1982. According to 8 C.F.R. § 245a.1, an applicant is ineligible for legalization under IRCA § 245A if any single absence exceeded 45 days, or if the aggregate of all absences was more than 180 days, unless the applicant proves that emergency circumstances prevented a more prompt return. Plaintiffs argued that the INS should have established a waiver procedure for those whose absences exceeded the time limits and should have informed aliens whose applications were denied for this reason that they could ask for an exception based on emergent circumstances. Plaintiffs also contended that the time limits themselves were arbitrary, since they were less indicative of “residence” than other factors establishing the applicant’s intent, such as whether the person maintained a home or business in the United States.
While the court agreed that the INS denial notices were "not models of clarity," the court held that they, nevertheless, provided information to applicants about emergent circumstances. Moreover, the court ruled that a waiver procedure was not required by the statute. Two groups of applicants with disqualifying absences were still seeking judicial relief via this case as of October, 1988: (1) those discouraged from filing or turned away because of absences, and (2) those who were denied, but did not appeal and for whom the 30-day appeal deadline has now passed.

A similar issue was considered in LULAC v. INS, — F. Supp. — , No. 87-4757-WDK (C.D. Cal., July 18, 1988). In this case, plaintiffs disputed INS regulations which distinguished between two types of re-entries by § 245A applicants: (1) those re-entries documented on I-94s, and (2) undocumented re-entries. 8 C.F.R. § 245a.2(b)(8). The INS took the position that if a 245A applicant re-entered with an I-94 after January 1, 1982, that person would be ineligible for IRCA, even though at the time of re-entry, the person was actually returning to a long-term residence in the United States. A "legal" re-entry as a non-immigrant (using an I-94) was considered to break the continuous unlawful residence period necessary for IRCA eligibility. Undocumented re-entries after this date, on the other hand, did not render 245A applicants ineligible for legalization. The court held that fraudulent re-entries using I-94 forms did not meaningfully interrupt continuous residence for IRCA purposes, and that there was no reasonable basis for distinguishing between the two types of re-entries. The court ordered that aliens discouraged from applying because of the disputed regulation could apply for legalization until 11/30/88. However, the court required that such applicants must file fraud waivers under INA § 212(i) because of their fraudulent use of the I-94s.

IRCA not only requires that amnesty applicants demonstrate continuous residence since 1982, but also § 245A(a)(3) requires that applicants establish that they have been physically present in the United States since a certain cut-off date. While the original section listed the date as November 6, 1986, this date was subsequently changed to May 1, 1987. However, "brief, casual and innocent absences" do not render an applicant ineligible for legalization. The INS definition of "brief, casual and innocent" was challenged in Catholic Social Services v. Meese, 685 F. Supp. 1149 (E.D. Cal. 1988). Plaintiffs successfully challenged INS regulations limiting "brief, casual and innocent" absences to those which had been previously authorized by an advance parole from the INS. 8 C.F.R. § 245a.1(g). The court found that the INS definition violated § 245A and ordered the INS to accept applications from class members.
(applicants denied legalization by reason of unparoled absences) until 11/30/88.

As mentioned in the Introduction, the district courts extended the deadline for IRCA applicants discouraged by illegal INS practices despite the Supreme Court's strong adherence to statutory deadlines in Pangilinan. Zambrano, LULAC, and Catholic Social Services all distinguished Pangilinan, holding that the Supreme Court's decision is limited to the specific statutory context under which the Pangilinan plaintiffs pressed their claim. In Catholic Social Services, the court firmly rejected the government's reliance on Pangilinan, stating that it was "inconceivable [that] Pangilinan ha[s] reversed 200 years of Anglo-American jurisprudence governing the equitable powers of courts to redress injuries for which there is no adequate remedy at law."

Among all the class-action suits contesting INS interpretations of the legalization provisions, those concerned with the definition of "known to the government" probably constitute the area of most resounding defeat for the Service. The phrase "known to the government" appears in IRCA § 245A(a)(2)(B) and affects non-immigrants who entered legally but overstayed their visas. Undocumented applicants for IRCA who entered legally as non-immigrants must show either that their visa expired before January 1, 1982 or that they violated the conditions of their non-immigrant status and that their "unlawful status was known to the Government as of such date." As interpreted by 8 C.F.R. § 245a.1.d, the phrase "known to the government" was narrowed to mean "known to the INS."

Last year's Immigration and Nationality Law Review summarized an individual's successful suit against this regulation, Farzad v. Chandler, 679 F. Supp. 690 (N.D. Tex. 1987). An important class-action case on this issue was resolved against the government in 1988. In Ayuda, Inc. v. Meese, 687 F. Supp. 650 (D.D.C. 1988), the court held that the "known to the government" language is satisfied if any government agency possesses a document that shows that the applicant was present and in violation of legal status before January 1, 1982. Such documents could be, for example, the tax return of a student visa holder who worked without authorization, or a social security form filed by an undocumented person. The requirement could also be satisfied if an undocumented person lived in the United States during this period, but "willfully" failed to file an alien registration card on a yearly basis. The court extended the filing deadline for those discouraged by the INS' illegal regulation until August 31, 1988. The deadline was subsequently extended again, to November 15, 1988. Ayuda, Inc. v. Thornburgh, Civ. No. 88-0625
By October 31, 1988, 6000 members of the plaintiff class had taken advantage of the court-ordered tolling of the filing deadline.

B. Developments Affecting SAW Applicants

Temporary residence via the Special Agricultural Worker (SAW) provisions is limited to those applicants who worked during the specified time period with “fruits and vegetables of every kind and other perishable commodities, as defined in [Department of Agriculture] regulations...” IRCA § 210(h). During 1988, class-action suits and refinements of the USDA regulations continued to define the class of crops conferring SAW eligibility.

For IRCA purposes, cotton was held to be a fruit (National Cotton Council of America v. Lyng, — F. Supp. —, Civ. No. CA-5-87-0200-C N.D. Tex., Feb. 8, 1988); sod was held to be a qualifying perishable commodity (Morales v. Lyng, 702 F. Supp. 161 (N.D. Ill. 1988)); but sugar cane was ruled not a vegetable (USDA final regulation, issued Aug. 19, 1988; 7 C.F.R. § 1.d.10). A vegetable, according to the USDA pronouncement, is “the human edible herbaceous leaves, stems, roots, or tubers of plants which are eaten, either cooked or raw, chiefly as the principal part of a meal, **rather than as a dessert**” (emphasis added).

While these refinements of the DOA definitions potentially affected thousands of agricultural workers, a change in the INS regulations was perhaps even more important. This change gave employers a much-needed impetus to provide agricultural workers with documentation of their work history; the modification was the direct result of a class-action suit brought on behalf of farmworkers. UFW v. INS, Civ. No. 87-1064 LKK (E.D. Cal., May 12, 1988). The court ordered the INS to promulgate a timely regulation to provide for production of employment records under INA § 210(b)(3)(B)(ii). On July 20, 1988, the INS amended 8 C.F.R. § 210.3(b) adding a new subparagraph 4, which sets out the procedure INS will use to try to obtain employment documents for SAW applicants from recalcitrant employers or labor contractors. However, before the INS will take action, there are several intermediate steps which workers must initiate. First, the worker must apply for legalization as a SAW and go through the INS interview. The INS must judge the applicant’s case as prima facie eligible for SAW status. The INS must decide that the worker’s case cannot be adjudicated without the relevant employment records. If all these conditions are met, the District Director then may subpoena the records, if the employer doesn’t voluntarily comply with a request from the INS for the records.

On two other issues, plaintiffs in the UFW suit were unsuccessful. The court upheld INS regulations requiring more than the worker’s own
affidavit as proof of SAW eligibility; it also held that INS had sufficiently publicized the deferral of employer sanctions. Additional parties have now intervened in this class action, challenging several aspects of INS procedures for ruling on SAW applications. These issues are very similar to those raised in Haitian Refugee Center v. Nelson, infra.

By November 30, 1988, the INS had received 1.1 million SAW applications. It is unknown what percentage of these will finally be approved. A large proportion of SAW applications during 1988 were denied. The INS also indicted some employers and workers for fraud in SAW applications. In January of 1988, under the INS “Operation Cucumber,” 61 persons were indicted for SAW fraud in southern Florida, where the INS claimed 50 percent of the applications were fraudulent. However, Interpreter Releases reported that by April, 1988, 29 of these cases had been resolved against the government. 65 Int. Rel. 437. It was expected that those remaining would be dismissed.

In at least one case, an attorney was also indicted. In United States v. Chauvin, Crim. No. 88-00236-A (E.D. Va. 1988), officials of a landscaping firm, Green Thumb Enterprises, and its attorney, Margaret Pijor, were charged with criminal conspiracy in connection with the allegedly false SAW applications of 10 undocumented employees. The defendants were also charged with criminal violations of INA § 274(a)(1)(C), harboring undocumented workers, and INA § 210(B)(7)(A)(ii), creating or supplying false documents in support of a SAW application. In a plea bargain reached on December 19, 1988, the corporation pled guilty to the charges in exchange for the government’s promise to dismiss charges against the owner of the company and another employee. On December 22, 1988, the court dismissed all charges against Ms. Pijor, the attorney, for lack of admissible evidence, holding that evidence against her had been seized in violation of the Fourth Amendment. One interesting argument that the court did not reach in Ms. Pijor’s case was an objection to the government’s interpretation of INA § 210(b)(7)(A)(ii) on constitutional grounds. The government argued that this section, which mandates criminal penalties for supplying false documents, is a strict liability statute, requiring no knowledge of wrongdoing on the part of the accused. Ms. Pijor, on the other hand, maintained that a strict liability felony violates due process.

In Haitian Refugee Center, Inc. v. Nelson, 694 F. Supp. 864 (S.D. Fla. 1988), plaintiffs sought an injunction against procedures used by the local INS offices in adjudicating SAW applications, charging that the disputed practices were counter not only to IRCA, but also to the governing INS regulations. The local documentation requirements made it impossible for certain SAW applicants to prove their eligibility, thus denying them
equal protection of the law. For example, in September, 1987, the INS had declared Form I-705 (Employee Affidavit Form) invalid, an action which plaintiffs alleged undermined workers' attempts to apply for SAW status. The plaintiffs also challenged a number of other procedural obstacles that the INS had placed in the way of Haitian workers attempting to legalize their status.

The court held that such procedures imposed an unlawful burden of proof on the applicant in establishing eligibility under the SAW program. The court found that the INS used a procedurally deficient interview process and had erroneously denied non-frivolous claims before March 29, 1988. Denial notices sent to applicants were held deficient, since they contained merely a general statement that did not give rejected applicants any idea of how they could appeal. In a preliminary injunction issued August 22, 1988, the court ordered the INS to (1) vacate denials where affidavits and other proof, but not employment records were submitted, unless the INS could rebut the inference that these establish eligibility, (2) allow applicants to present witnesses on their own behalf at interviews, (3) employ interpreters qualified in Spanish and Haitian Creole, (4) issue work authorizations to class members (i.e., SAW applicants unlawfully denied). The court also ordered that, by September 30, 1988, the INS must review all denied I-700 applications for SAWs which were filed in Alabama, Florida, and Georgia to determine whether these were improperly rejected. The INS must then mail a notice informing those applicants who were improperly denied that their cases are currently being readjudicated and that the applicant should report to his or her local immigration office to obtain a work permit while the application is pending. Finally, the court ordered the INS to modify its denial notices so that applicants are informed of the reasons for denial, made aware of additional documents which may be needed, and given forms and instructions on the method of appeal.

C. Preparation for the RAW Program

IRCA § 303 provides for the admission of “replenishment” agricultural workers (RAWs) beginning in FY 1990 and continuing through FY 1993, if it is determined that there is a shortage of agricultural workers. The RAW program is distinct from legalization through the SAW provisions (§ 201). Workers applying to become RAWs may be either undocumented persons already in the U.S., or foreign workers. Through the RAW provisions, workers will enter the U.S. as LTRs. If they continue to work in agriculture during the three consecutive years after admission, RAWs may adjust their status to become permanent
residents. After five years of agricultural work, RAWs will be eligible for citizenship.

The need for such workers is to be determined jointly by the Secretaries of Labor and Agriculture, using a complex formula set out in the statute. The number of man-days worked by seasonal agricultural workers is one factor weighed in the formula. During 1988, the Wage and Hour Division of the Department of Labor proposed regulations for gathering this information from current employers of workers in SAW status. According to proposed 29 C.F.R. Part 502, issued July 19, 1988, growers must submit quarterly reports specifying the number of “man-days” each SAW worked during the preceding period. For purposes of the proposed regulations, a “man-day” is counted even if the employee worked only part of a day. The reporting requirements are scheduled to begin in October of 1988, with fines for failure to report beginning on December 1, 1988. The proposed regulations provide for fines of up to $1000 for employers who do not submit the necessary paperwork. However, actual admission of replenishment workers is not scheduled to begin until October of 1989.

D. IRCA-Related Regulations of Other Federal Agencies

During 1988, the Departments of Agriculture and Health and Human Services issued regulations implementing the five-year disqualification from certain public benefits for aliens who have gained LTR status through IRCA.

DOA issued final rules in March of 1988 which listed the categories of aliens eligible for food stamps. 7 C.F.R. §§ 272 and 273. Temporary legal residents under § 245A who are aged, blind or disabled, and special agricultural workers legalized under § 210 are eligible for the food stamp program. Aliens eligible for registry under the IRCA provisions (see § 249) also are eligible, as will be RAWs admitted during FY 1990-1993. Other LTRs may not receive food stamps until five years have passed from the date on which they were granted legal temporary residence.

Health and Human Services final regulations concerning AFDC were published on August 22, 1988. Most LTRs are disqualified from receiving AFDC benefits for five years; the disqualification applies equally to those legalizing their status under §§ 245A and 210. Only Cuban/Haitian entrants and aged, blind or disabled LTRs are exempted from the five-year ban.

HHS regulations also listed classes of LTRs eligible for federal Medicaid benefits. Access to Medicaid benefits are less generous for aliens admitted under § 245A than for those receiving LTR status as SAWs. Most of the people admitted under § 245A are disqualified from receiving federal Medicaid benefits for five years. However, children under 18,
aged, blind or disabled LTRs, and Cuban/Haitian entrants may receive full Medicaid benefits. Other § 245A LTRs may receive Medicaid benefits only for emergency services, or for women, for services related to pregnancy. SAWs who meet the criteria for AFDC (except for their immigration status) may also receive only limited benefits. Other SAWs are eligible for full Medicaid benefits.

E. Implementation of Systematic Alien Verification for Entitlements (SAVE)

As part of IRCA, Congress ordered that by October 1, 1988, the states must require alien applicants to verify their immigration status when applying for six federally-funded public benefits programs: AFDC, Medicaid, Unemployment Compensation, Food Stamps, Housing Assistance and Educational Assistance. INA §§ 121(a)(1), (2), and (3). Verification will be facilitated by a central database, the Alien Status Verification Index. States are exempt from the SAVE program if the cost of verification outweighs the potential savings. In 1988, eleven states applied for waivers from the SAVE program for unemployment benefits, but only eight partial waivers were granted. 54 Fed. Reg. 206 (1989). All states must participate in manual verification of aliens’ eligibility for unemployment benefits. The eight exempt states need not participate in the automated verification system.

Federal agencies administering benefits programs were ordered to promulgate regulations implementing SAVE procedures by October 1, 1988. Most of the federal agencies were not in compliance by that date, however. By October 1, only the Department of Agriculture had issued such regulations, and the Department of Education decided that the SAVE program will not be cost-effective for educational assistance.

V. Permanent Residence Issues

Most of the activity in this area during 1988 concerned implementation of changes enacted by Congress in 1986. The INS published regulations for attaining permanent residence status through the second stage of legalization. The Immigration Marriage Fraud Amendments (IMFA) of 1986 provoked many court challenges, including some disputing the constitutionality of §§ 204(h) and 245(e).

A. Procedures for the Second Stage of IRCA Legalization

IRCA provides that legal temporary residents who fulfill residency requirements and do not become excludable while in temporary status may adjust to become legal permanent residents. IRCA §§ 210(a)(2) et seq. and 245A(b)(1) et seq. In order to gain permanent resident status,
LTRs also must show that they have some knowledge of the English language and U.S. civics.

The INS published regulations for the second stage of legalization as an interim rule in November, 1988, with comments due November 30. The regulations became effective on November 7, 1988, the same day that the INS began accepting applications for adjustment from IRCA LTRs. The time period for application is a relatively short one: IRCA LTRs must file during the one-year period beginning eighteen months after they received LTR status. The application fee for Form I-698 is $80 per person, with a maximum of $240 per family.

The regulations specify the ways applicants may satisfy the English language and civics requirement, per INA § 245A(b)(1)(D). 8 C.F.R. § 245a.3.(b)(4)(ii). First, applicants may take a standardized English proficiency test, to be developed by a subcontractor and approved by the INS. Or, the applicant may be tested during the course of an interview with an INS examiner, using a standard set of questions. If the applicant fails the interview test, he or she will have six months in which to retake it. Testing is expected to be the least popular option. As a second alternative, the applicant may demonstrate “satisfactory pursuit” of a course of study in English and U.S. government. Satisfactory pursuit can be shown by a certificate indicating that the applicant has attended 40 hours of a 60-hour course; the applicant may also study at home for 40 hours and take a short, oral test in English. Applicants who are under 16, or who have completed one academic year of study including 40 hours of English and civics, are exempt from these requirements.

B. Implementation of the Immigration Marriage Fraud Amendments

1. Final INS Regulations.

Final regulations implementing the IMFA were published by the INS in early August, 1988. 53 Fed. Reg. 30,011 (1988). The IMFA created a new category of “conditional permanent resident” for alien spouses seeking to become LPRs through marriage to American citizens or LPRs. “Conditional” status also applies to relatives of the alien spouse whose applications for LPR status are based on the alien spouse’s marriage. Conditional status applies only to aliens whose U.S. citizen or LPR spouse files a visa petition within two years of the “qualifying marriage.” The alien spouse, and relatives whose status depends on the marriage, remain in the conditional status for two years from the date of the petition, after which time the alien must apply to have the condition removed to receive LPR status. Once the condition is removed for the alien spouse, relatives
whose status is contingent on the alien’s also may change their conditional status to LPR.

Section 5 of the IMFA has been the focus of many lawsuits. This section affects marriages which occur after the issuance of an Order to Show Cause, while the alien spouse is in immigration proceedings to determine whether he or she will be allowed to remain in the United States. INA § 204(h) requires that the alien spouse in such a marriage reside outside the United States for two years after the marriage. Periods of foreign residence before the marriage do not count. The two years need not be continuous, as long as the aggregate period is two years.

Regulations originally proposed by the INS (on January 27, 1988) provided that the IMFA’s foreign residence requirement applied not only to aliens who had married during deportation proceedings, but also to those who married while contesting rescission under INA § 246. In February of 1988, however, the Board considered such a case and held that the IMFA provision does not apply to persons subject to rescission proceedings. Matter of Oduro, File A27 101 193 (BIA Feb. 23, 1988). The final INS regulations were modified, to make clear that the foreign residence requirement applies only if the marriage occurred while the alien spouse was in deportation or exclusion proceedings.

2. Relevant Dates.

Different provisions of the IMFA do not have the same effective date. This problem was clarified in a letter written by R. Michael Miller, INS Deputy Assistant Commissioner for Adjudications, to Michael Friedberg, an immigration attorney in Los Angeles, on May 4, 1988. Some provisions of the IMFA refer to the date the law was enacted: November 10, 1986. For example, Section 5 restrictions apply to all marriages entered into on or after November 10, 1986 in which the alien spouse was in deportation or exclusion proceedings at the time of the marriage.

For marriages which did not occur while the alien spouse was in proceedings, conditional status (§ 216) does not depend on the date of passage of the IMFA, but rather on the length of time between the “qualifying marriage” and the date on which the visa petition was filed on behalf of the alien spouse. For example, if a couple married on September 24, 1986 and a visa petition on behalf of the alien spouse were filed one year later (in September, 1987), IRCA § 216 would be applicable to that petition. The alien spouse would have to remain in conditional status until September, 1989, since the petition was filed after the passage of the IMFA and it also was filed within two years of the “qualifying marriage.”
Mr. Miller emphasized that in order to determine whether the IMFA apply to a particular marriage, each part of the IMFA must be examined section by section. For sections which do not mention a specific date or event, the relevant date must be taken to be the date of passage of the Amendments; thus, marriages which occur after November 10, 1986 are affected by such sections.

3. **INS Survey on Marriage and Other LPR Fraud.**

A 1986 INS survey claimed that 30 percent of applications for LPR status on the basis of marriages were fraudulent; this same INS survey was utilized as evidence that up to 60 percent of labor certifications were obtained through fraud. *Interpreter Releases* addresses major flaws in the methodology of the INS study, casting considerable doubt upon its sweeping conclusions. 2 *Int. Rel.* 26 (January 11, 1988). The study's sample was small—only 1/20th of one percent of all the I-130s and I-140s that the INS processed in FY 1984. Sampling methods were also biased, resulting in conclusions which were wildly discordant with the INS' rate of denial of such applications. While the survey concluded that the fraud level was at least 30 percent, the INS denied only 4.6 percent of such applications in FY 1984.

4. **Litigation Challenging the Constitutionality of the IMFA.**

As mentioned in last year's review, a number of lawsuits have challenged § 204(h), the foreign residency requirement of the IMFA, which applies to marriages contracted after an Order to Show Cause has been issued in deportation or exclusion proceedings. Although challenges to the constitutionality of the IMFA continued in 1988, they enjoyed very limited success.

*Smith v. INS,* 684 F. Supp. 1113 (D. Mass. 1988) which was mentioned in last year's review, resulted in summary judgment for the INS. In *Smith,* the court held that the IMFA's distinction between marriages based on the time they were contracted was a rational one and justified by the government's compelling interest in deterring "sham" marriages. *Escobar v. INS,* Civ. No. 88-0730 (D.D.C., Dec. 9, 1988), which also challenged the IMFA on due process and equal protection grounds, was decided against the alien spouse and his U.S. citizen wife.

In *Anetekhai v. INS,* 685 F. Supp. 588 (E.D. La. 1988), a couple married in Louisiana challenged 8 U.S.C. § 1154(h), which implements the IMFA two-year foreign residence requirement, asking that the court declare it unconstitutional. The plaintiffs based their complaint not only on Fifth Amendment due process and equal protection grounds, but also on the Ninth and Tenth Amendments. They argued that the disputed
regulation unreasonably interferes with Louisiana state laws regarding marriage and divorce. The court ruled against the couple, stating that their understanding of the Louisiana marriage laws was incorrect; moreover, the court held that the foreign residence requirement was a legitimate exercise of Congress’ plenary power to regulate immigration.

In *Azizi v. Meese*, Civ. No. H87-957 AHN (D. Conn., Jan. 20, 1988), the plaintiff couple prevailed, at least temporarily. In this case, the couple successfully contested the INS’ refusal to consider an immediate relative’s visa petition for the husband. The INS argued that the IMFA applied to the marriage, which took place while the husband was in voluntary departure status. After he failed to leave on time, the INS instituted deportation proceedings. In these subsequent proceedings, the INS relied on the IMFA provision in its refusal to consider the petition. The U.S. citizen wife challenged this refusal as affecting “a fundamental right,” claiming that she and her husband were denied procedural due process. The court issued a preliminary injunction barring deportation until the INS considered the petition.

5. **Waiver Provisions.**

INA § 216(c)(4) provides that, under certain circumstances, the Attorney General may allow an alien in conditional status to become an LPR without filing a joint petition for removal of the condition. Waivers of the joint petition requirement may be granted if the alien shows that (1) he or she would suffer extreme hardship if deported, or (2) he or she has ended the qualifying marriage for good cause.

In correspondence with Florida attorney Michael Bander, Lawrence Weinberg, INS Deputy Assistant Commissioner for Adjudications and Senator Simpson explained good cause waivers. To show good cause, the alien spouse must submit Form I-752, along with a copy of the divorce or annulment decree which indicates that the alien was the moving party. In a pending divorce action, the alien must submit Form I-752 and copies of the petition for divorce or annulment, to be updated when the dissolution is final. Mr. Bander observed that since 50 percent of U.S. marriages end in divorce, it is unreasonable to require that the alien spouse be the moving party in order to qualify for a good cause waiver. He argued that this requirement would allow a U.S. citizen spouse to mistreat an alien spouse in conditional status, threatening the alien with a divorce action which would destroy the alien’s chances for attaining permanent residence through the marriage.

In reply, both Senator Simpson and the INS official affirmed that unless the alien spouse is the moving party in a divorce (or annulment) action, he or she would not meet the good cause standard for waiver
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and would have to qualify on hardship grounds. Although Senator Simpson noted that the moving-party requirement might have unfortunate consequences for some troubled marriages, he maintained that it is consistent with the overall purpose of the immigration laws, which preserve family relationships.

C. Adjustment of Status

The INS clarified new INA § 245(c), enacted as part of IRCA. This section prohibits aliens from adjusting their status to LPR if they have not maintained continuous legal status while in the United States. Aliens may adjust if they can show that any lapses occurred through technicalities beyond the alien's control. On Nov. 19, 1987, INS Associate Commissioner for Examinations, Richard E. Norton, responded to a letter written by Michael A. Maggio, Chair of AILA's INS Central Office Liaison Committee. AILA had judged that under the new law, the following groups should be regarded as having maintained legal status: (1) aliens who have applied for adjustment, (2) applicants for political asylum, and (3) applicants for extended voluntary departure. Mr. Norton's letter explained that the INS view is a much more narrow one, that is, that "a person who admits to being in a deportable class of aliens is not in a legal status." It seems likely that this section will be further clarified as adjustment cases come before the Board under the new law.

The Cuban-Haitian adjustment provisions of IRCA (INA § 202) were the focus of a New York class action filed in September, 1988. Lozier v. Thornburgh, 88 Civ. 6098 (S.D.N.Y. 1988). INA § 202 allows Cubans and Haitians who have been paroled into the U.S. and who have resided here continuously since January 1, 1982, to become legal permanent residents. By October, 1988, one month before the application deadline (November 7, 1988), 28,000 Haitians had been granted LPR status under these provisions.

However, the New York INS office has denied adjustment to a significant number of Haitian applicants. Lozier was brought on behalf of all Haitians in New York who failed to apply because they feared mistreatment from the INS, and on behalf of those denied adjustment because their travel documents were no longer valid when they arrived in the U.S. from Haiti. The INS summarily rejected adjustment applications from the latter group on the grounds that they were inadmissible under INA § 212(a)(19), which concerns visa or document fraud. The Haitian applicants argued that such summary denials, allowing no possibility for rebuttal, violated their statutory and constitutional rights to due process. Plaintiffs also contested INS withdrawal of work authorization and inadequate denial notices. The disputed INS procedures were similar to
those struck down in *Haitian Refugee Center v. Nelson*, Section IV, supra. On November 8, 1988, the INS agreed not to initiate deportation proceedings against any Cuban or Haitian whose application was denied solely on the basis of INA § 212(a)(19). The Service also agreed to restore work permits to Cuban and Haitian applicants who personally appeared at the New York INS office and proved that their applications had been denied for only this reason.

D. Permanently Residing Under Color of Law (PRUCOL)
Status for Purposes of Public Benefits

Given the many changes in status brought about by IRCA, several agencies set about clarifying which classes of aliens were eligible for certain public benefits. The changes affecting LTR's have been discussed in Section IV, supra. Health and Human Services, following the SSI categories laid out in *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985), proposed 16 categories of aliens for purposes of determining federal Medicaid eligibility. The eligible groups included asylees, those granted indefinite voluntary departure, and “any other aliens living in the United States with the knowledge and permission of the INS and whose departure that agency does not contemplate enforcing.”

The Department of Education explained its position on financial aid to “conditional permanent residents” in a letter from Director and Deputy Assistant Secretary for Student Financial Assistance Programs in December of 1987. The Department’s position is that aliens in this status are eligible to receive Title IV financial aid.

Two important state cases in 1988 helped define aliens’ eligibility for unemployment benefits. In *Sandoval v. Colorado Division of Employment*, 757 P.2d 1105 (Colo. 1988), the court of appeals determined that a Colorado statute defining PRUCOL status for purposes of unemployment benefits was incomplete and not consistent with the federal definition, which the state had adopted through earlier case law. Colo. Rev. Stat. § 8-73-107(7)(a) listed only five classes of aliens as PRUCOL: refugees, asylees, LPRs, and those granted indefinite parole or deferred action status by the INS. The court held that the list should not be considered an exclusive definition of PRUCOL, but only an illustration of some of the categories of aliens who would qualify. Therefore, the court set aside a decision of the Industrial Claim Appeals Office denying benefits to the plaintiff, who had applied for adjustment of status based on his marriage to a U.S. citizen.

A precedent decision by the Unemployment Appeals Board in California held that an alien who had applied for amnesty under IRCA qualified for unemployment benefits, since at the time of his employment,
he was “lawfully present” in the United States. *Lozano v. United Temporar y Service*, No. P-B-460 (Mar. 15, 1988). The employer argued that the worker was disqualified from state financial assistance programs by virtue of INA § 245(A)(h)(1), the IRCA five-year disqualification provision. The Board disagreed, holding that unemployment benefits are not a program of “financial assistance” according to the IRCA definition because they are not need-based. For purposes of benefits calculation, the Board mandated that the worker be considered legally present as of the date IRCA was enacted, November 6, 1986.

**E. Continued NP-5 Visa Program**

IRCA § 314 provided for 5,000 nonpreference visa numbers to be awarded in FY 1987 and FY 1988 to immigrants from countries which had been “disadvantaged” by the 1965 INA amendments. As explained in Section II, the perceived disadvantage generally affects European nations and results from the abolishment of the National Origins Quota Act. The Department of State listed 37 countries whose citizens could be eligible for this program. As described in last year's review, the response to the program in 1987 was overwhelming, with over a million people contending for the 10,000 total visas. During fiscal year 1988, the priority dates for these visas continued to advance very slowly. In early 1988, the INS clarified its position regarding derivative status for spouses and children of NP-5 visa holders. In response to a question by a New York immigration attorney, INS Deputy Assistant Commissioner for Adjudications, Richard M. Miller, stated that even if the principal beneficiary's spouse and children had not been included on the original NP-5 visa application, they might still be able to obtain LPR visas derivatively. However, the Department of State must verify first that the principal beneficiary has been granted a visa under the program.

The NP-5 program was significantly expanded with the passage of Pub. L. No. 100-658, enacted on November 15, 1988. Pub. L. No. 100-658 authorizes continuation of the NP-5 program for FY 1989 and FY 1990, and increases the annual number of visas from 5,000 to 15,000.

**VI. Refugee and Asylum Issues**

The year 1988 witnessed a number of important procedural and substantive changes relating to political asylum. The INS proposed and then withdrew controversial regulations which would have denied most political asylum applicants the opportunity to have their case heard by an immigration judge. Final regulations promulgated by the Attorney General set up definitive procedures for status review for incarcerated Cuban
refugees who came to the United States during the Mariel boatlift. In addition, the BIA and the courts ruled in several key asylum cases.

A. Political Asylum

1. Procedures.

During 1988, the BIA, several circuit courts of appeal and the U.S. Supreme Court considered political asylum cases from which important principles relating to procedures emerged. Each of these principles, in turn, has serious substantive consequences.

The Supreme Court considered the standard of judicial review for a motion to reopen in *INS v. Abudu*, 485 U.S. —, 108 S. Ct. 904 (1988). Assibi Abudu, a Ghanian, was in deportation proceedings based on a drug conviction. Although he had explicitly declined to apply for political asylum in 1981, in 1984, Abudu received a visit from an official of the Ghanian government which caused him to fear persecution if he returned. After the visit, Abudu submitted a motion to reopen in order to apply for political asylum. The BIA denied his request, holding that he had not sufficiently explained his failure to apply for asylum initially, and alternatively, he had not made out a prima facie case of eligibility for asylum. The United States Court of Appeals for the Ninth Circuit reversed in part and remanded, stating that the only issue to be decided was whether the applicant had made out a prima facie case for re-opening. The court of appeals held that the appropriate standard for deciding a motion to re-open is similar to that used by a federal district court in ruling on a motion for summary judgment.

The Supreme Court unanimously reversed. The Court affirmed the BIA's denial of the motion to reopen based on the applicant's failure to explain why he did not apply for asylum initially and ruled that the appropriate standard of review of that determination is abuse of discretion. The Court held that the Ninth Circuit's analogy between a motion to reopen and a motion for summary judgment was inappropriate. Motions to reopen should be judged by a very strict standard, analogous to that required for granting a new trial in a criminal case on the basis of newly-discovered evidence. Thus, applicants who seek to re-open deportation proceedings bear a much heavier evidentiary burden than those who seek asylum from the outset.

In dicta, the court observed that where the ultimate relief sought is discretionary, as in asylum cases, it is permissible for the Board to look beyond criteria for the motion to re-open to the merits of the case itself, "and simply determine that even if they were met, the movant would not be entitled to discretionary . . . relief." 108 S. Ct. at 912.
One of the most significant cases affecting refugees in 1988 was Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal 1988). In Orantes, the federal district court issued a strongly-worded injunction against the INS practices of persuading Salvadoran refugees to agree to depart voluntarily from the United States. A case brought by the National Center for Immigrants' Rights, the ACLU, the National Lawyers' Guild, and the Legal Aid Foundation of Los Angeles, the year-long trial exposed the extent of INS coercion. The judge ordered the INS to stop using "threats, misrepresentation [and] subterfuge" to pressure Central American refugees to give up their right to apply for asylum and return to their home countries. 685 F. Supp. at 1511.

The court found that INS agents and officials were ignorant about conditions in Central America which impelled refugees to seek asylum in the United States. "The impression . . . that Salvadorans come to the United States solely for economic gain reflects a lack of sensitivity and understanding and derives from ignorance on the part of INS agents as to the complex motivations and situations of those who have fled El Salvador." Id. at 1496. On the contrary, the court found that many Salvadoran refugees who come to the United States have valid asylum claims. Id. at 1507. Many ordinary civilians in El Salvador face violent repression and human rights abuses because of their membership in trade unions or other associations; however, the Salvadoran judiciary provides no recourse against persecution on the basis of political opinion.

The court ordered the INS to provide understandable notice to refugees about their right to asylum. The INS also must ensure that refugees have access to telephones, accurate lists of free legal services, and writing materials. The INS may not transfer detainees from the area in which they were apprehended for at least seven days, so that refugees may have an opportunity to contact legal services in the area. The government appeal of this decision is currently pending in the Ninth Circuit.

The Ninth Circuit affirmed an asylum applicant's right to be represented by an attorney in Reyes Palacios v. INS, 836 F.2d 1154 (9th Cir. 1988) (per curiam) and in Castro-O'Ryan v. INS, a case summarized in last year's review. Castro-O'Ryan was decided July 14, 1987, but published as amended in 847 F.2d 1307 (9th Cir. 1988). In Reyes Palacios, an asylum applicant appeared alone at a deportation hearing. Although the Immigration Judge (IJ) asked the applicant if he had a lawyer, he did not examine the reasons why the lawyer was not present at the hearing or ask whether the applicant needed a continuance to get legal representation. After the hearing, the IJ ordered the petitioner deported, a decision which the BIA affirmed. However, the Ninth Circuit held that the IJ's failure to inquire about legal representation for the applicant
constituted a violation of his due process rights. The court noted that assistance of counsel is especially important in asylum cases where the law is "complex and developing. . . ." 836 F.2d at 1155.

In Baires v. INS, 856 F.2d 89 (9th Cir. 1988), the court of appeals affirmed the right of asylum applicants to present evidence at deportation hearings. Portillo Baires, a Salvadoran, twice requested a change of venue from Arizona to San Francisco, where he was now living and where he had retained an attorney. After the first request was denied by telephone, his attorney, who could not travel to Arizona, arranged for another attorney to appear with Mr. Baires and to personally request a change of venue and a continuance five days before the scheduled hearing date. The second attorney argued that these changes were necessary because (1) the applicant planned to present testimony of three witnesses, who could not travel to Arizona, and (2) the applicant wished to present testimony of an expert witness who could not travel to Arizona and who had not had time to prepare. The IJ rejected these motions as untimely and ordered the scheduled hearing to proceed, at which time the applicant was held ineligible for asylum or withholding and ordered deported. The BIA affirmed.

The applicant appealed to Ninth Circuit, arguing that the IJ denied him his constitutional, statutory and regulatory rights to present evidence and to be represented by an attorney of his choice at no expense to the government. INA § 242(b); 8 U.S.C. § 1252(b) (1982); and 8 C.F.R. § 2442.16(a) (1988). The court of appeals did not reach the constitutional issue, but held that the IJ's denial of a change of venue constituted an abuse of discretion under INS regulations, which allow a change of venue for "good cause" 8 C.F.R. § 3.27 (1988), on motion by one of the parties. 8 C.F.R. § 3.19(b) (1988). The court of appeals held that the applicant had demonstrated good cause. Moreover, the court held that the IJ's denial violated the applicant's statutory right to present evidence, and resulted in prejudice to the applicant. The court concluded, "aliens' statutory rights in deportation proceedings must be respected and . . . the desire for expeditious handling of immigration cases cannot justify the evisceration of aliens' statutory rights."


The BIA considered several cases of Central American refugees who maintained that they would be persecuted for refusing to participate in wartime actions of either the Army or guerrilla forces in their native countries. The Board's decisions in these cases continued to define the standards for conscientious objection and fear of forced conscription as a basis for an asylum claim. However, the Board's decisions also showed
a tendency to view as legitimate even actions which have been condemned by human rights organizations.

In *Matter of A-G*, Int. Dec. 3040 (BIA 1987), the Board denied a motion to reopen deportation proceedings for a Salvadoran man who refused to serve in his country's armed forces, and who alleged that he would face severe persecution on the basis of the same political beliefs which prevented him from serving. The young man stated that his moral and political convictions would not permit him to associate himself with armed forces which have been condemned by the international community for their human rights abuses.

The Board held that the petitioner had not presented a case for persecution on the basis of political opinion, since the Board did not regard the Salvadoran government's sanctions for refusing to serve as persecution. However, refusal to serve in the armed forces could constitute persecution, "where the alien would necessarily be required to engage in inhuman conduct as a result of military service." *A-G*, slip op. at 5. The Board held that in order to establish a well-founded fear of persecution on the basis of military abuses, an applicant must show that (1) such abuses represent the *policy* of his or her government, and (2) they have been condemned by an international governing body, for example, by a resolution of the United Nations.

The federal judiciary did not share the Board's view; on the contrary, the Fourth Circuit observed that the BIA had held the refugee to an exceptionally harsh standard of proof. *M.A. v. INS*, 858 F.2d 210 (4th Cir. 1988), *reh'g granted*. According to the court of appeals, the petitioner was not obliged to show that he, as an individual draftee, would be compelled to commit atrocities. Nor was he obliged to prove that military abuses constituted an explicit policy of the Salvadoran government condemned by a U.N. resolution. It was sufficient for his asylum claim that he present (1) evidence showing the "pervasiveness" of atrocities committed by the military against the civilian population, and (2) documentation on the methods of conscription used by the Salvadoran armed forces, which made it likely that he would be forced to serve. The court relied on the *United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status* (UN Handbook) and the Geneva Conventions as a basis for its ruling that when the armed forces of a country commit atrocities against civilians, draft evasion can be justified and can form the basis for a well-founded fear of persecution under the Refugee Act. The Board's view that draft evasion generally is a basis for legitimate governmental punishment was too broad and failed to consider the specific circumstances, in this case, of military recruitment and operation in El Salvador. Since the appeals court judged
that the applicant had established a prima facie case for political asylum, this court reversed the Board and remanded the case for re-opening of the petitioner's claim. On January 11, 1989, the Fourth Circuit granted the government's petition for *en banc* rehearing.

The Geneva Conventions also figured prominently in *Matter of Medina*, Int. Dec. 3078 (BIA 1988). In *Medina*, a Salvadoran woman sought withholding of deportation, relying on a private right which she contended was created by the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (in force for the United States as of February 2, 1956), 6 U.S.T. 3516, T.I.A.S. No. 3365. The immigration judge held that under the Fourth Convention and customary international law, withholding of deportation may be granted to civilians who have fled armed conflict in countries which violate the terms of the Fourth Convention; however, he declined to grant withholding of deportation to the applicant on the grounds that she had not established that El Salvador violated the terms of the Geneva Convention. The BIA reversed and held that neither customary international law nor the Fourth Geneva Convention created a private right to withholding of deportation for persons fleeing from civil wars. The Board observed that the Fourth Convention applies mainly to victims of international wars, and that application of the Fourth Convention to individuals in deportation proceedings would fall outside the jurisdiction of the INS.

Other cases this year address whether forcible recruitment by rebel forces constitutes persecution. In *Arteaga v. INS*, 836 F.2d 1227 (9th Cir. 1988), the applicant had resisted Salvadoran guerrillas' attempts to recruit him, stating that he wished to remain neutral. He fled his country after the guerrillas threatened to kidnap him and force him to serve in spite of his beliefs. The Ninth Circuit concluded that the applicant legitimately feared persecution (kidnapping) from the rebel forces on the basis of his political beliefs (neutrality). "Forced recruitment by a revolutionary army is tantamount to kidnapping, and is therefore persecution." 836 F.2d at 1232. However, in *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988), the court emphasized that its remarks on kidnapping were dicta, since *Arteaga* was decided on other grounds.

In *Matter of Maldonado-Cruz*, Int. Dec. 3041 (BIA 1988), the Board denied the asylum claim of a Salvadoran young man who had been forcibly recruited by the guerrillas and who had deserted after being obliged to attack his own village. He feared that the guerrillas would kill him for his desertion as they had a friend with whom he had been recruited. Although the young man stated that his personal beliefs favored neither group, he feared persecution from both sides—from the guerrillas for his desertion, and from the government, for his participation in
guerrilla actions. In contrast to the Ninth Circuit's opinion in *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985), the BIA did not consider the young man's neutrality a political opinion for which he could be persecuted. The Board held that the reprisals that the young man feared from the guerrillas had nothing to do with his political beliefs, but resulted from the act he had committed against them, his desertion. The Board considered both the guerrillas' forced methods of recruitment and their punishments for deserters to be legitimate means of troop control in time of war. The Board also held that any investigation the Salvadoran government might make of the young man was lawful and reasonable, and was not a basis for seeking asylum. The case currently is pending in the United States Court of Appeals for the Ninth Circuit.

The Board reaffirmed its position that neutrality does not constitute a political opinion in *Matter of Vigil*, Int. Dec. 3050 (BIA 1988). In *Vigil*, the Board rejected the asylum claim of a 20-year-old Salvadoran who stated that he feared persecution from both sides. The Board held that the applicant's statement of political neutrality, first expressed at his deportation hearing, was an insufficient basis on which to found a claim for asylum. Such tacit neutrality, the Board held, is indistinguishable from worries of the general populace in El Salvador about what may happen to them during the civil war. The Board also emphasized that claims of asylum based on membership in a social group do not extend to young men of draftable age. Only characteristics which are fundamental, identifying factors, and which are beyond the person's power to change may be considered marks of a "social group" for purposes of asylum adjudication. See also *Matter of Acosta*, Int. Dec. 2986 (BIA 1985). The Board rejected the applicant's contention that, upon his return, he would face persecution because he had applied for asylum in the United States. Evidence that refugees who returned to El Salvador had been killed or disappeared did not establish that the returnees were singled out as victims because they had applied for asylum, the Board reasoned.

In *Matter of Fuentes*, Int. Dec. 3065 (BIA 1988), the Board restricted the notion of political opinion, denying asylum to a Salvadoran man who was a former guard at the U.S. Embassy in El Salvador and who also had been a member of the national police. While the man might have had reason to fear attacks from the rebel forces during the time he spent in these occupations, the Board held that his fear was not necessarily on the basis of his political opinions. If membership in the police, armed forces, or guerrilla bands constituted political opinion for which the members could be persecuted, the Board reasoned, then members of the opposing side would necessarily be considered persecutors and ineligible
for asylum. Membership alone is not a sufficiently narrow indicator of political opinion.

Although the applicant's former membership in these occupations is an "immutable characteristic" and would qualify the petitioner as belonging to specific social groups, the Board concluded that the petitioner had not provided evidence that could establish former members of the national police or embassy staff as persecuted social groups in El Salvador.

Arthur Helton summarized the principal Board cases treating the Salvadoran civil war as taking too categorical an approach to the definitions of "political opinion," "persecution," and "social group"—a view which does not coincide with the circumstances of individual refugees fleeing hostilities in that country. See Helton, *Recent BIA Jurisprudence in Salvadoran Asylum Cases*, 42 ILPR Monographs A3-163-69 (Sept. 1988) and 43 ILPR Monographs A3-169-176 (Oct. 1988). This commentator argued that the Board's approach conflicts with the Refugee Act requirements and the obligations of the United States as a signatory to the *Protocol Relating to the Status of Refugees*, which mandate individualized consideration of an applicant's petition for political asylum, based on the specific situations which the person would face, were he or she to be returned. Individual circumstances should be examined in light of the record of civil rights abuses by both sides in El Salvador in the course of the lengthy civil war and the pervasiveness of persecution based on imputed political opinion. Helton observed that while these recent BIA cases have focused on the conflict in El Salvador, the Board's rulings also could have profound consequences for other asylum seekers fleeing from the upheavals of civil war in their home countries.

In *Dwomoh v. Sava*, 696 F. Supp. 970 (S.D.N.Y. 1988), the federal district court further defined who qualifies as a *refugee*. The applicant, Dwomoh, was a Ghanian soldier who had participated in an attempted coup against a military dictatorship in that country. He had been beaten and imprisoned for these activities, but managed to escape to the U.S. He stated that he feared persecution on the basis of his political beliefs, and could be executed if he were returned to Ghana. The Board held that Mr. Dwomoh's actions were treason for which the Ghanian government might legitimately punish him. His participation in the coup, the Board held, was a common law crime which prevented him from meeting the definition of a refugee.

On a writ of habeas corpus, the federal district court reversed and remanded, holding that the BIA's interpretation of *refugee* was too narrow and contravened the legislative intent of the Refugee Act. The court noted that at the time Mr. Dwomoh participated in the coup attempt, there was no legal procedure in Ghana which would allow for the expres-
sion of dissent or for a change in government. Mr. Dwomoh's participation in the attempted coup thus was an expression of his political views, for which he feared reprisals from the current Ghanian regime. The Ghanian government's prosecution of Mr. Dwomoh would be, in effect, persecution for his expression of political opinion.

Participation in the persecution of others disqualifies a person from being protected as a refugee, even though the person might have a well-founded fear of persecution. INA § 101(a)(42). In Rodriguez-Majano, Int. Dec. 3088 (BIA 1988), the Board overruled an IJ's decision that forced participation by the applicant in the Salvadoran rebel forces meant that he had participated in the persecution of others. The applicant in Rodriguez-Majano, like the Salvadoran young man in Arteaga, had been forcibly conscripted into the guerrilla forces, which he deserted after a short time. He had been beaten and tortured by the police and stated that he feared persecution from both sides. The Board held that "mere membership in an organization, even one which engages in persecution, is not sufficient to bar one from relief, but only if one's action or inaction furthers that persecution in some way." Id. at 6.

In two important cases, the Ninth Circuit distinguished between persecution based on personal vendettas and persecution on account of political opinion. In Desir v. Ickert, 840 F.2d 723 (9th Cir. 1988), the petitioner fled from Haiti after systematic harassment by the Ton Ton Macoutes, a paramilitary security force associated with the Duvalier government. The Macoutes forced fishermen, like Desir, to pay bribes to them in order to fish in certain waters, but Desir refused to pay. For his refusal, he was arrested, beaten, and threatened on several occasions. In exclusion proceedings, the IJ ruled that Mr. Desir's testimony was credible, but that it was not evidence of persecution on account of political opinion. The Board affirmed, reasoning that the Macoutes extorted money from Desir for personal, rather than political reasons. After a petition to the district court for habeas corpus was denied, Mr. Desir appealed to the Ninth Circuit. The court of appeals reversed and remanded. The court held that Desir's resistance to government-sponsored extortion constituted "a political choice" in the Haitian context. 840 F.2d at 729. His refusal to cooperate with the Duvalier "kleptocracy" (government by thievery) caused Desir to be viewed as a subversive and treated as such by government agents. Therefore, the court held, Mr. Desir qualified for political asylum because he had been persecuted on the basis of political opinions attributed to him by the government. The court remanded the case for findings on the probability of persecution under the current Haitian regime given the change in government.
In *Blanco-Lopez v. INS*, 858 F.2d 534 (9th Cir. 1988), a Salvadoran applicant had been denounced to the police as a guerrilla gunrunner by a personal enemy. Although the accusation was false, Blanco-Lopez was held by the police for three days and threatened with death because of it. After he was released through the help of an influential friend, the authorities came to his home searching for him and told his parents that they would kill him if they found him. The IJ held that because the accusation originated in a personal dispute, it did not constitute persecution on account of political opinion. The BIA affirmed. The BIA also stated that the Salvadoran government has a legitimate right to investigate accusations of criminal activity.

The court of appeals reversed and remanded, holding that the origin of the accusation was irrelevant. The crucial issue to be decided was whether the petitioner had shown that he faced a clear probability of persecution from the government on the basis of the political opinion attributed to him in the false accusation. The court held that Blanco-Lopez met the standard for withholding of deportation. Moreover, the court found no evidence to support the Board’s conclusion that police detention of Blanco-Lopez was part of a legitimate criminal prosecution: “We conclude that the incident described by Blanco-Lopez was not in furtherance of a criminal prosecution, but rather was one of governmental persecution based on Blanco-Lopez's perceived political beliefs.” [Emphasis in the original.] 858 F.2d at 534.


As explained in last year’s chapter, INS proposals in 1987 which would have removed immigration judges from the asylum adjudication process were strongly opposed by the legal community, who viewed these changes as drastically reducing the due process rights of asylum seekers. In response to these objections, the INS issued a revised proposed rule on April 6, 1988. 53 Fed. Reg. 11,300 – 11,310 (to be codified at 8 C.F.R. Parts 3, 208, 236, 242, and 253). The comment period for the revised rule ended May 6, 1988, but no final regulations as yet have been issued.

The revised proposal retains the original INS idea of creating “Asylum Officers” who initially decide an applicant’s request for political asylum and withholding of deportation; under the current proposal, their jurisdiction would be the equivalent of that of the present district directors. Affirmative applications for asylum, for persons not in exclusion or deportation proceedings, would be decided by the “Asylum Officers” without a formal hearing. But, if an applicant is subject to an Order to Show Cause, his or her claim for asylum and withholding would be heard before an immigration judge, as in the current regulatory scheme.
While the revised rule of April, 1988, retained the role of the immigration judge in hearing asylum claims, at the same time, it severely limited the substantive matters which could be considered during the hearing. According to proposed §§ 236.3(c) and 242.17(c)(4), the immigration judge need not hear the merits of the applicant’s asylum case, “if one or more grounds exist for the mandatory denial of the applicant’s claim for asylum or withholding of deportation.” 53 Fed. Reg. 11,301 (1988). The regulation states that it is intended to remedy the inefficiency of cases such as Arauz v. Rivkind, 834 F.2d 979 (11th Cir. 1987), in which the court of appeals held that even though the IJ established that petitioner had a drug conviction which would preclude a favorable exercise of discretion upon his asylum claim, the judge nevertheless was obliged to hear the substance of the applicant’s case for asylum and withholding and to decide it on its own merits. Although the regulation mentions only Arauz, at least two other cases came to the same conclusion: Castro-O’Ryan (see last year’s review) and Shenandeh-Pey v. INS, 831 F.2d 1384 (7th Cir. 1987). The INS argued that such adjudication was unnecessary and wasteful. The Service therefore set about to make denials mandatory in such cases without a full hearing on the merits.

Similar regulations were again proposed by the INS in August, 1988. 53 Fed. Reg. 28,231-28,233 (amending 8 C.F.R. § 208.10(b), (c) and (f)). Under the August rules, the IJ would not be obliged to hear the merits of the applicant’s asylum claim if the judge determined that the person (1) posed a security risk to the United States, (2) had participated in the persecution of others, or (3) had committed a “particularly serious” crime in the United States. Although the INS stated that these regulations were only minor revisions of the asylum procedures, in fact, they could result in the pretermission of many valid asylum applications.

Under the proposed regulations, the central question—whether the applicant has a well-founded fear of persecution—would never be reached if one of the three negative factors were present. Interpreter Releases has pointed out that there may be considerable disagreement about who is regarded as a security risk or what constitutes a particularly serious crime. Matter of Juarez, Int. Dec. 3066 (BIA 1988), is one example of such disagreement between the IJ and the Board. The IJ considered a Guatemalan applicant’s conviction of a misdemeanor assault to establish a “particularly serious crime” precluding asylum; the judge denied the claim without hearing the merits. On appeal, the BIA reversed and remanded.

In a memorandum to the Attorney General and in public announcements made in December, 1988, the INS has sought drastic changes in procedures for asylum adjudication. INS Commissioner Alan Nelson, in
a memorandum to Attorney General Thornburgh on December 13, 1988, asked the Justice Department to close its Asylum Policy and Review Unit and to impose very strict standards for granting work authorization to asylum applicants. The INS announced in mid-December that work authorization will no longer be granted until an applicant’s case is reviewed; moreover, asylum applicants will not be permitted to leave the area in which they file their applications. The Service sent several additional adjudicators to its Harlingen office in an attempt to process asylum applications more rapidly; similar staff increases were proposed for the Miami and Los Angeles offices.

The INS restrictions on work authorization and travel prompted several class action suits which were still in progress at the end of 1988. In one of these, *Alfaro-Orellana v. Ichert*, No. C-88-4729-CAL (N.D. Cal., Dec. 14, 1988), the plaintiffs won a temporary restraining order against the INS on December 14, 1988. The plaintiff class is made up of asylum seekers whose applications have been denied by the district director and whose work authorizations were rescinded. The judge accepted plaintiffs’ argument that while their appeals of the district director’s decision are processed, they are entitled to work authorization.

**B. Regulations Concerning Marielitos**

Since the Mariel boatlift of 1980, the fate of Cuban detainees in INS custody has been of continuing concern. Cubans detained for crimes committed after their arrival in the United States staged uprisings at two U.S. prisons in 1987. As part of the agreement which ended the uprisings, the government proposed to set up review panels which would decide on repatriation for Cuban detainees. Final rules published by the office of the Attorney General in December, 1987, set out procedures for Justice Department adjudication of possible repatriation for Cubans in detention. 53 Fed. Reg. 48,799-48,804 (Dec. 28, 1987). The process is entirely administrative, with no possibility for judicial review. The decision about whether the applicant is paroled or ordered repatriated depends on whether the person was detained by the INS on basis of criminal activity.

For Cuban detainees not arrested for criminal activity, the regulations set up a Cuban Review panel to adjudicate parole decisions.

For those who have been detained for crimes, a Repatriation Committee makes the decision regarding expulsion. In these proceedings, the Cuban applicant may be represented by counsel. He or she also may appeal a negative decision internally.

On December 2, 1988, after the U.S. Supreme Court denied a petition for a stay of deportation, the first five Marielitos were repatriated to Cuba. This is the first such repatriation since 1985. As of December 5,
1988, the INS had paroled the vast majority of Cuban detainees; however, several hundred remain in custody.

VII. Exclusion and Deportation

During 1988, Congress restricted protections against deportation or exclusion on the basis of speech or association to non-immigrants. Congress also enacted legislation which significantly increases penalties and restrictions against aliens convicted of criminal activity. However, an important federal district court decision held that aliens' freedom of speech and association, like that of U.S. citizens, is protected by the First Amendment.

A. Continued Action Against Ideological Exclusions and Deportations

As mentioned in Section I, Congress modified and extended the provisions of § 901(a) of the Foreign Relations Authorization Act ("FRAA") in October, 1988. The legislation will remain in force until January of 1991. Section 901(a) prohibits the exclusion or denial of a visa to any non-immigrant on the basis of speech or association which would be constitutionally protected if the alien were a U.S. citizen. Section 901(b) describes a number of groups whose members are not eligible for these protections: terrorist organizations, labor organizations which are "instruments of a totalitarian state," and the Palestinian Liberation Organization (PLO).

The protections of the original § 901 (Pub. L. No. 100-204, enacted in 1987) were instrumental in the First Circuit's decision in Allende v. Shultz, 845 F.2d 1111 (1st Cir. 1988). The court of appeals granted summary judgment for Hortensia de Allende, the widow of Chilean president Salvador Allende. Ms. Allende was active in the World Peace Council and the Women's International Democratic Federation. Because of her membership in these organizations, the Department of State denied, on ideological grounds, her request for a visa to conduct a speaking tour in the United States, charging that she was ineligible for admission under INA § 212(a)(27). The Department of State determined that "her entry would be prejudicial to foreign policy interests of the U.S." No waiver of exclusion or inadmissibility is available to a person who is held excludable under § 212(a)(27). See Abourezk v. Reagan, 108 S. Ct. 252 (1987).

The federal district court ruled that Ms. Allende was improperly excluded, since INA § 212(a)(27) cannot be based solely on membership in what the State Department regards as "suspect" organizations. On
appeal, the State Department claimed that it based its decision to deny Ms. Allende a visa not only on her membership in organizations, but also on the speaking activities she would be engaged in once in the United States. However, by the time the case reached the U.S. Court of Appeals, FRAA § 901 had been enacted, rendering speech no longer a proper basis of visa denial. The court observed, "Having decided that some harmful activity is a prerequisite to subsection 27 exclusion, and that the activity at issue in the Allende exclusion is speech, we need go no further." 845 F.2d at 1121.

Section 901, which was extended on October 1, 1988, protects aliens who apply for non-immigrant visas or who seek admission as non-immigrants between October 1, 1988 and January 1, 1991; it also applies to non-immigrants who are in deportation proceedings based on activities occurring during that time period, or for whom deportation proceedings are pending any time between December 31, 1987 and January 1, 1991. According to a cable sent by the INS to all its field offices on November 4, 1988, aliens seeking immigrant visas or adjustment of status are no longer protected by § 901, effective 10/1/88. Nevertheless, the Service is precluded from deporting any immigrant "who gained status by virtue of the now-repealed portion of section 901."

In another case which has been pending during the shift from the earlier version of § 901 (which protected those seeking immigrant visas as well) to the current, more limited version, it is unclear which form of the law will be utilized by the court. In Randall v. Meese, 854 F.2d 472 (D.C. Cir. 1988), Margaret Randall, a former U.S. citizen, now a citizen of Mexico, seeks to return to the United States as a legal permanent resident. The INS has denied her petition on the grounds that her political writings render her excludable under 8 U.S.C. § 1182(a)(28)(G). Ms. Randall contends that the initial, more ample protections of the first FRAA § 901(a) should apply to her application for adjustment of status, which was originally filed in 1985. If the new, limited version of § 901 applies to her case, she may be deported.

In American-Arab Anti-discrimination Committee v. Meese, Civ. No. 87-02107 SVW (KX) (C.D. Cal., Jan. 26, 1989), the court considered the constitutionality of the PLO exception to FRAA § 901(a) as well as the restrictions on speech and association incorporated into the McCarran-Walter Act (codified at INA §§ 241(a)(6)(D), (F)(iii), (G)(v) and (H)) in a class-action suit brought by a number of individuals and interested organizations. Deportation proceedings had been instituted against some of the plaintiffs, who were legal permanent residents, because they allegedly belonged to an organization which "advocated unlawful damage to property." INA § 241(a)(F)(iii). Other plaintiffs specifically
challenged their preclusion from the statutory protections of FRAA § 901(a).

The court held that in the deportation context, as in other aspects of their life in the United States, resident aliens are protected by the First Amendment. Aliens may not be deported for expressing views or for associating with organizations which would be protected outside the deportation realm, for to do so, the court held, would stifle all freedom of expression among this population.

The court found the disputed sections of the McCarran-Walter Act "unconstitutional on their face" and violative of the First Amendment, since the government may not prohibit the expression of dissent unless this speech is likely to incite a riot or "lawless violence." Since the Act prohibits all forms of expression advocating communism, destruction of property or the establishment of a totalitarian dictatorship in the United States, it is impermissibly broad.

It could as easily be applied to prohibit an alien from wearing a PFLP [Popular Front for the Liberation of Palestine] button, attending a PFLP lecture, distributing a PFLP newspaper or teaching a PFLP viewpoint as it could be applied to preventing advocacy of imminent lawless violence. Slip. op. at n.—.

The court also observed that mere membership in the PLO was insufficient reason to suppose that an applicant would engage in prohibited activities once in the United States.

If the American-Arab case is upheld on appeal, its potential ramifications could be great. Provisions of the McCarran-Walter Act, a remnant of Cold War legislation, have formed the basis for a very large number of exclusions and deportations from the 1950s to the present. Not only members of the plaintiff group, but of any group viewed as "subversive" or "communist" by the INS or State Department potentially could benefit from this ruling. The use of national security as a basis for exclusion was disputed in Rafeedie v. INS, 688 F. Supp. 729 (D.D.C. 1988). In this lawsuit, a Jordanian-born resident of the United States challenged the first summary exclusion proceeding ever brought against a legal permanent resident under INA § 235(c). Mr. Rafeedie left the United States for a brief visit abroad after obtaining permission from the INS. When he returned, the INS charged him with being excludable as a risk to national security, citing INA §§ 212(a)(27), (28)(F) and (29). While his exclusion proceedings were pending, Mr. Rafeedie was paroled into the United States. Shortly thereafter, the INS moved to close the exclusion proceedings. Under § 235(c), Mr. Rafeedie was not notified of the exact
nature of the charges, nor was he allowed to examine the evidence against him.

Mr. Rafeedie argued that as a returning LPR, he was entitled to due process. He challenged the summary proceedings as violative of his Fifth Amendment rights and sought an injunction prohibiting the INS from taking any action in his case until the INS regional commissioner scheduled a hearing for him before an immigration judge. Rafeedie also stated that exclusion proceedings against him violated the then-current § 901 prohibition against excluding resident aliens for acts or speech which would be protected if engaged in by United States citizens. Rafeedie was granted the preliminary injunction, but the court denied his motion for summary judgment on the due process claim.

B. Crime-Related Exclusions and Deportations

Crime-related exclusions and deportations constituted a very active area in 1988. Legislators enacted stricter penalties for aliens convicted of serious crimes. In addition, the BIA revised its definition of what constitutes a “final criminal conviction” for immigration purposes. Both of these actions may make it considerably more difficult for certain aliens to enter, return to, or achieve legal resident status in the U.S. Nevertheless, for aliens caught up in criminal proceedings, several state court rulings affirmed their right to understand the immigration consequences of plea decisions in criminal matters.

I. Anti-drug Regulations and Legislation.

Following Pub. L. No. 99-570, the Anti-Drug Abuse Act of 1986 and IRCA (INA §§ 212(a)(23) and 241(a)(11)), the INS published regulations which implement changes in the statute. The previous INA § 212(a)(23) stated that aliens could be excluded for violating laws or regulations relating to the possession and sale of a specific list of drugs. The revised statute provides for exclusion if (1) the alien has been convicted of a violation relating to “a controlled substance (as defined in section 102 of the Controlled Substances Act. . . .)” or if (2) consular or immigration officers “know or have reason to believe” the alien has engaged in illegal trafficking of these substances. The main change in wording of the statute was from a specific list of drugs to a cross-indexing with 21 U.S.C. § 802, the Controlled Substances Act. INS regulations implementing these changes are at 8 C.F.R. §§ 241.2, 242.2, 287.1, 287.7.

Congress debated two pieces of anti-drug legislation during September and October, 1988: S2852 and H.R. 5210. Both contained a number of immigration provisions. S2852, the Senate version, included a proposal
for summary deportation without a hearing for aliens convicted of drug trafficking or other aggravated felonies.

The House version, which was approved by Congress on October 22, 1988, softened the immigration provisions somewhat. 134 Cong. Rec. S17318 (daily ed. Oct. 21, 1988). The Anti-Drug Abuse Act of 1988, as the House version is known, also provides for expedited immigration proceedings for aliens convicted of aggravated felonies (murder or trafficking in drugs or firearms). However, unlike the Senate proposal, the Act allows aliens convicted of such felonies to have deportation hearings before immigration judges. These aliens will, nevertheless, be placed in INS detention immediately after serving their criminal sentences, and their conviction of such crimes will serve as a conclusive presumption of deportability at their hearings.

The Act also increases fines and jail terms for aliens convicted of a felony who have illegally re-entered the United States after deportation. For most re-entering felons, the penalties will be increased from two years in prison and/or $1000 fine to five years imprisonment and/or $10,000 fine. For those convicted of aggravated felonies, the penalty for illegal re-entry could be as much as 15 years in prison and a fine of $20,000. This legislation also increases the time an alien convicted of a felony must wait to re-apply for admission to the United States after deportation from five to 10 years.

This anti-drug law also bars aliens convicted of aggravated felonies from voluntary departure. A further provision sets up penalties for assisting alien felons (or others excludable for drug offenses or crimes) in entering the United States. The Act requires the INS to set up a four-city pilot project to increase the Service's participation in drug enforcement and crime task forces, allocating $26.2 million for the fiscal year for the project.

One version of the legislation called for stamping the travel documents of U.S. citizens and resident aliens who had been convicted of a drug-related crime. This provision was dropped in the final form, although the Act still provides for revoking the U.S. passports of those indicted for drug crimes.

During 1988, the Board of Immigration Appeals also adjudicated an important case under amendments made to the INA by earlier crime control legislation. In *Matter of Hernandez-Ponce*, Int. Dec. 3055 (BIA 1988), the Board considered amendments made to INA § 241(a)(11) by the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. These amendments "significantly broadened the language used to describe the types of [drug] offenses which have traditionally jeopardized an alien's status." *Id.* at 4. Before the passage of the 1986 Act, INA § 212(a)(11)
listed specific prohibited acts (such as possession or sale); it also named specific illegal substances. The amended version renders an alien deportable if he or she "has been convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance. . . . " The Board held that under amended § 212(a)(11), Hernandez-Ponce's two convictions for use and being under the influence of PCP rendered him deportable.

2. Changes in the Definition of Final "Convictions" and "Sentences Imposed" for Deportation Purposes.

In Matter of Ozkok, Int. Dec. 3044 (BIA Jan. 26, 1988), the Board revised its definition of what constitutes a "final" criminal conviction for deportation purposes. In Ozkok, a Turkish-born legal permanent resident pled guilty to possession of cocaine with intent to distribute in a criminal proceeding in Maryland. The state court deferred adjudication of guilt and placed the alien on probation for three years, ordering him to do community service and to pay a fine. One year later, the INS issued an Order to Show Cause for the alien, asserting that the criminal proceedings had rendered him deportable. He contested the OSC, stating that his situation did not constitute a final "conviction" under the BIA standards.

Under the standards established in Matter of L-R-, 8 I&N Dec. 269 (BIA 1959), to establish a "conviction" for deportation purposes, three requirements must be met: there must be a judicial finding of guilt; a court action must take place which removes the alien's case from the list of those pending (for example, a suspended sentence); and the criminal court's action must be considered a conviction by the state for at least some purposes.

In its decision, the BIA explicitly rejected the standards used since 1959 and set out new criteria defining a criminal conviction for deportation purposes. The BIA now considers an alien convicted of a crime if (1) a judge or jury found the alien guilty, or she or he entered a plea of guilty or nolo contendere, and (2) the presiding judge imposed some form of punishment, penalty or restraint on the alien's liberty, and (3) under the prevailing statute, a judgment of guilt could have been entered if the alien violated the terms of probation without further proceedings to determine the alien's guilt or innocence of the original charge. Under the third requirement, it is important to note that the alien may be considered convicted even though he or she fulfills all the conditions of court-imposed probation. The Board held that Ozkok met the new criteria for conviction, since he had pled guilty, the judge imposed punishment, and his probation could have been revoked without a further proceeding.
to determine his guilt of the original charge. Therefore, the Board reasoned, Ozkok's cocaine conviction was sufficient to support an order of deportation.

The Board's original opinion in Ozkok also contained very restrictive language concerning aliens who had been processed for drug offenses under the Federal Youth Corrections Act, the first offender provisions of the federal Controlled Substance Act, and corresponding state provisions. The Board stated that since it believed that Congress had repealed both federal statutes, these statutes could no longer be used to eliminate the convictions of aliens for immigration purposes. Instead, it was consistent with the intent of Congress that such convictions be considered "final." Therefore, the Board would henceforth consider aliens processed under these statutes (or their state counterparts) as meeting the Board's criteria for final criminal convictions. The Board also stated that while for most crimes, an expungement prevents a judgment from counting as a conviction for immigration purposes, a sentence for narcotics or marijuana would count as a conviction, regardless of expungement.

The Board withdrew and replaced its decision in Ozkok on April 26, 1988, insofar as its reliance on Congressional repeal of the first offender provisions was mistaken. Congress continued the first offender provisions of 18 U.S.C. § 844(b) in a successor statute, 18 U.S.C. § 3607. In the amended Ozkok decision, the Board therefore eliminated reference to the Youth Corrections Act and the first offender provisions of the Controlled Substances Act.

The Board also withdrew the original decision in Ozkok a principal case, on which the Board had relied for evidence of Congressional intent, which was overruled by subsequent legislation. The Board based its notion that there should be a uniform definition of final "conviction" on the Supreme Court's holding in Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 103 S. Ct. 986 (1983). In Dickerson, the Court reasoned that Congress had intended a uniform definition of "criminal conviction" for the purposes of the Gun Control Act of 1968. However, the Firearm Owners' Protection Act, Pub. L. No. 99-308, subsequently overruled Dickerson, stating that the finality of a criminal conviction, for gun control purposes, shall be determined by the applicable law of the relevant jurisdiction.

Despite its replacement of the original decision, the Board applied the new criteria for determining a "conviction" retroactively to the respondent in Ozkok, and the INS is currently attempting to apply the Ozkok definition in a similar way to other aliens in deportation proceedings. The Board's new criteria for final "convictions" will render more aliens deportable than under the old definition. Another BIA decision in 1988
is likely to have the same effect. In Matter of Castro, Int. Dec. 3073 (BIA 1988), the Board defined what constitutes a sentence “actually imposed” for purposes of determining an alien’s eligibility for the petty offense exception to INA § 212(a)(9). An alien who would be excludable under § 212(a)(9) may be granted a visa if he or she was convicted of a petty offense for which the sentence “actually imposed” did not exceed a term of six months’ imprisonment. In Castro, the respondent had been convicted of selling counterfeit money. He was sentenced to a term of two years in prison; however, the court suspended execution of the sentence and placed him on probation for three years. Because a sentence was “actually imposed” on the respondent, even though it had not been executed, the Board held that he was ineligible for the petty offense exception, and upheld the IJ’s order of deportation.

3. Issues Concerning Expungements.

In early 1988, Joseph L. Thomas, Director of the INS Western Regional Processing Center, responded to questions about expungements from a Gilroy immigration attorney. In his letter, Mr. Thomas expressed the opinion that expunged crimes would still count as crimes for purposes of IRCA eligibility; that is, an expunged felony would still count as a felony and would prevent an otherwise eligible alien from qualifying for amnesty under IRCA.

However, this early opinion turned out to be misguided. In April, 1988, the INS Central Office clarified the position of the Service on expungements and IRCA eligibility. For purposes of IRCA eligibility, expunged crimes will not be counted as a bar to legalization.

4. Relief from Deportation Via Audita Querela.

In United States v. Salgado, 692 F. Supp. 1265 (E.D. Wash. 1988), a federal district court revived the ancient writ of audita querela to prevent deportation of an alien who had lived many years in the United States. Mr. Salgado, the petitioner, was a legal permanent resident of the United States, with a U.S. citizen wife and children. He had been convicted of failure to pay a transfer tax on a small amount of marijuana in 1964, for which he served 18 months in prison. At the end of his term he was ordered deported and returned to Mexico. Prison officials told Mr. Salgado he could not return to the United States for two years—an instruction he obeyed. However, the INS never confiscated Mr. Salgado’s green card. After two years, he returned to the United States, where he lived for many years, making occasional visits to relatives in Mexico and returning without incident, using the same document.
In 1984, Mr. Salgado applied for social security benefits, which led to an investigation of his immigration status, and ultimately, to his being placed in deportation proceedings, since the INS considered that he was in the United States unlawfully. While he was in proceedings, IRCA was enacted. The court, the U.S. attorney, and Mr. Salgado were all in agreement that a second deportation of Mr. Salgado would be inequitable.

The court therefore had recourse to audita querela, a common law writ which allows a defendant to obtain relief against the consequences of a judgment on account of some defense which has arisen since the judgment was rendered. The court observed that this writ was abolished in civil cases by Federal Rule of Civil Procedure 60(b), but it was still available for equitable relief in criminal cases. Since Mr. Salgado's conviction in 1964, the amnesty provisions of IRCA were made available, for which he would be fully qualified, but for the fact of his drug (felony) conviction. Using audita querela, the court vacated Mr. Salgado's drug conviction, giving him the opportunity to apply for legalization.

The writ was also used in United States v. Ghebreziabher, 701 F. Supp. 115 (E.D. La. 1988), to vacate an alien defendant's plea of guilty to a misdemeanor charge of food stamp trafficking which had rendered him ineligible for amnesty under INA § 245(a)(4)(B).


In criminal matters, as in immigration proceedings, the courts affirmed alien defendants' rights to due process, including competent assistance of counsel. Last year's review and Section VI above have summarized Castro-O'Ryan v. INS, 821 F.2d 1415 (9th Cir. 1987) [amended as: 847 F.2d 1307 (9th Cir. 1988)], in which the Ninth Circuit overturned a deportation decision based on an immigration hearing in which an alien petitioner was not represented by counsel.

In People v. Pozo, 746 P.2d 523 (Colo. 1987), the Colorado Supreme Court explicitly described the duties of lawyers defending aliens in criminal matters. The court held that a criminal defense attorney representing such a client has an affirmative duty to research the possible immigration consequences before recommending a guilty plea. Alternatively, the defense attorney has a duty to seek a Judicial Recommendation Against Deportation (JRAD) from the criminal court. A closely divided majority (4-to-3) of the court held that the alien defendant, in order to show that he was denied effective assistance of counsel, must establish three basic facts: (1) counsel had reason to know that the defendant was an alien before recommending a plea bargain, and (2) counsel failed to research the immigration consequences, which (3) resulted in prejudice to the alien defendant. Such research is essential, the court held, since “in cases
involving alien criminal defendants, thorough knowledge of fundamental principles of deportation law may have significant impact on a client’s decisions concerning plea negotiations or defense strategies.” *Pozo*, 746 P.2d at 529. The Cuban defendant’s case in *Pozo* was remanded to the lower court for a determination on the three factual issues.

The *Pozo* holding is in accord with an earlier decision by the Ohio appellate courts, which considered the question of ineffective criminal defense for aliens as a matter of first impression. *State v. Avanitis*, 33 Ohio App. 3d 213 (1986). In *Avanitis*, the Ohio court considered whether defense counsel’s failure to warn of deportation consequences in recommending a guilty plea amounted to an involuntary entry of the plea, as well as ineffective assistance of counsel. The court concluded that the evidence was not sufficient to establish that either of these errors had occurred, since the court found that his attorney’s failure to warn of deportation consequences did not “influence” the alien to plead guilty, and the error not prejudicial. Moreover, nine years had elapsed between the allegedly ineffective assistance and the alien’s complaint against the attorney. Given this delay, the court did not believe the alien’s claim that he would not have pleaded guilty had he known of the immigration consequences. The Ohio court pledged to take all such cases individually, examining the particular facts of each in deciding whether an attorney’s assistance is so poor as to violate an alien criminal defendant’s right to due process.

Recent state court decisions in California, Wyoming, and Wisconsin also have further defined attorneys’ duties to alien criminal defendants. In *State v. Soriano*, 194 Cal. App. 3d 1470 (1987), the court held that even though the trial court had complied with Cal. Penal Code § 1016.5 (which mandates warning an alien defendant in open court about the immigration consequences of pleading guilty), this did not relieve the alien defendant’s counsel of responsibility to also discuss these consequences with his client. As in *Pozo*, the California court held that an attorney in such a case has an obligation to research the relevant law and provide adequate answers to alien defendants’ questions concerning the consequences of a guilty plea.

However, in *Wisconsin v. Jarusirinukul*, No. 88-1018-CR (Wis. App. 1988), the court of appeals refused to set aside an alien defendant’s guilty plea to a drug charge because his attorney had not given adequate responses to the alien’s questions about possible immigration consequences of a conviction. The attorney had merely told his client “not to worry,” and that further legal difficulties would be addressed as they came up. After the alien’s conviction, Wisconsin enacted a statute requiring attorneys to advise alien defendants about the effects of criminal convictions
on their immigration status. Wis. Stat. §§ 971.08 (1)(c) and (2). Jarusirinukul argued, unsuccessfully, that the statute should be applied retroactively, allowing him to withdraw his guilty plea.

An appeal under Wyoming law was also unsuccessful. In *Carson v. Wyoming*, 755 P.2d 242 (1988), the INS instituted deportation proceedings against an alleged Canadian who had pled guilty to a prison escape. The defendant, who had consistently maintained that he was born in Chicago, asked the court to allow him to withdraw his guilty plea because he had never been informed of possible immigration consequences of a conviction, basing his claim on Rule 15(c)(1) of the Wyoming Rules of Criminal Procedure, which requires that defendants be informed of both the minimum and maximum penalties provided by law before pleading guilty to an offense.

A 1988 Texas case has stressed the importance of the court's admonishment to alien defendants in criminal cases. In *Ex parte Mario Tovar Cervantes*, 706 S.W.2d 577 (Tex. 1988), the Texas Court of Criminal Appeals set aside an alien's conviction for DWI (driving under the influence) because the lower court did not advise the defendant that his plea of guilty could result in deportation. The lower court made no mention of deportation consequences to the defendant, even though the alien's DWI conviction was charged as a felony under a repeat offender statute. The court of appeals found that the lower court had violated state law requiring the court to issue an admonishment in these circumstances before accepting a guilty plea. Tex. Code Crim. Proc. Ann. art. 26.13(a)(4) (Vernon 1987).

Recent state and federal case-law addressing this issue is reviewed in Rosenberg & Stern, "Ineffective Assistance of Counsel: An Antidote for the Convicted Alien," 65 *Int. Rel.* 529 (May 23, 1988).

**C. Procedural Safeguards**

In addition to the rights of aliens in criminal matters, important decisions were published in 1988 concerning aliens' right to travel and work while awaiting INS rulings on status applications. Litigation also addressed conditions of detention for aliens in INS custody.

**1. Litigation Concerning Work Permission.**

In 1986, the Ninth Circuit ruled in a class action against the INS and held that INA § 242(a) does not authorize the Attorney General to impose a no-work rider as a condition of release on bond for those aliens who are awaiting deportation or exclusion hearings. *NCIR v. INS*, 791 F.2d 1353 (9th Cir. 1986). The court of appeals issued an injunction against this practice. The U.S. Solicitor General petitioned the Supreme
Court for certiorari, which was granted. The court summarily vacated the 1986 Ninth Circuit decision and remanded the case to the federal district court for consideration in light of the IRCA provisions against unauthorized work. On remand, the district court concluded, in essence, that IRCA makes no difference; IRCA does not grant authority or discretion to the Attorney General to impose a no-work condition for release. *NCIR v. INS*, —F. Supp.—No. CV 83-7927-KN (C.D. Cal., Dec. 31, 1987). Since IRCA targets the employers of aliens without work permission, rather than alien employees, the court held, its provisions cannot serve as a foundation for a blanket no-work rule.

A recent Texas decision addressed work permission problems experienced by undocumented persons who are awaiting immigrant status through the petitions of immediate relatives. *Perales v. Casillas*, —F. Supp.—, Civ. No. SA-86-CA-910 (W.D. Tex. 1988). Before the passage of IRCA, the INS office in San Antonio regularly granted work permission and voluntary departure status to undocumented persons who were due to become legal permanent residents within 60 days. In March, 1988, the INS instituted several restrictions on work permission, requiring applicants to show both need and “humanitarian factors” in order to be considered for work authorization. Applicants also were often denied voluntary departure status, rendering them vulnerable to deportation proceedings which the INS began against those who protested the new work permission policy.

In a class action suit against the INS, plaintiffs contended that these policies amounted to a violation of applicants’ due process right to work. Moreover, they argued, the restrictive local policies on work permission constituted an abuse of discretion since they went beyond the eligibility criteria authorized by the INS regulations. Accepting plaintiffs’ arguments, the federal district court issued a permanent injunction against the disputed practices on November 14, 1988. The court observed that “appropriate discretionary authority does not include the ability to do whatever the agency wants for unstated or incongruous reasons.” *Perales*, slip op. at 20-21. The court held that the local INS office had exceeded its authority in imposing additional, unjustified restrictions. The court ordered:

- the Service may not consider the alien’s willingness to wait for the visa interview abroad, economic need, diligent pursuit of the visa application by the alien’s spouse, impact on the U.S. labor market, or the filing of a frivolous request for political asylum in making adjudications for employment authorization and voluntary departure.
Many refugees from Central America have found themselves stranded in Texas due to a new INS policy, described in Section VI, which requires that asylum seekers remain in the jurisdiction where their application is filed until it is adjudicated. In *Morazan v. Thornburgh*, No. B-89-002 (S.D. Tex., Jan. 9, 1989), the federal district court issued a temporary restraining order against this practice but failed to issue the repeated preliminary injunction. Plaintiffs argue that the travel ban was instituted in violation of the Administrative Procedure Act, which requires 30-days notice for all major changes in agency policy. More importantly, plaintiffs contend that the travel restrictions prevent asylum applicants from obtaining a full and fair hearing on their claims, in violation of their right to due process.

2. Conditions of INS Detention.


This class action was brought on behalf of all aliens under 18 who have been, are, or will be detained by INS in the Western Region. The INS had a regular procedure of strip-searching incarcerated juvenile aliens in the Western Region when they were admitted to detention and when they were visited by anyone other than attorneys. The court held that such searches are unreasonable (since there were no security reasons justifying them) and violative of the juveniles’ Fourth Amendment rights. The court stated that because these searches are very intrusive, a strict standard of reasonable suspicion must be applied. The INS did not meet its burden of showing reasonable suspicion to justify these searches; therefore, plaintiffs were granted an injunction against this unlawful practice.

The regional INS policy was to release minors only to parents or legal guardians. Since parents of many detained minors are also undocumented, their fear of detention prevented them from going to the INS for their children, with the result that children remained incarcerated, often for prolonged periods.

In May, 1988, the court held that the Service must release children to a responsible adult non-relative when the parents are unable to claim them. Furthermore, the court ordered the INS to make other, substantial improvements in its detention policies for children. The INS may not hold children in regular INS facilities for more than 72 hours, but must
place children in licensed facilities with child welfare experience, such as foster homes.

In *Orantes-Hernandez v. Meese*, summarized in Section VI, the court addressed not only the INS practice of coercing Salvadoran detainees to depart "voluntarily," but also the conditions under which class members were held. For example, the INS in El Centro often placed Salvadoran detainees in solitary confinement for disciplinary purposes, without giving any explanation. The Service dubbed this practice "administrative segregation." The court held that such confinement violated due process and prohibited the INS from placing detained class members in solitary confinement for more than 24 hours without notice of the charges, an opportunity to be heard, and a written statement of reasons for disciplinary action. 685 F. Supp. at 1513. As mentioned in Section VI, the *Orantes* court also struck down unlawful INS transfer policies, which had prevented refugees from obtaining adequate legal representation.

In 1988, INS regulations regarding inspection of aliens were changed to implement a new statute. Until 1986, INA § 233 stated that commercial carriers were responsible for the custody of alien passengers found excludable at United States borders. In 1987, the Department of Justice added INA § 286(d), as part of Pub. L. No. 99-500, tit. I, § 101(b), repealing INA § 233. The new section imposed a user fee of $5 for the inspection of every passenger, but the INS became responsible for custody of any passengers detained. INS regulations published on January 22, 1988 implement these changes. 53 Fed. Reg. 1791-93 (1988).


Last year's review discussed *Escobar-Ruiz v. INS*, an important case holding that the Equal Access to Justice Act (EAJA) also applies to aliens in deportation proceedings. In *Montes v. Meese*, No. CV 86-4081 AWT (C.D. Cal., Dec. 4, 1987), a class-action suit by asylum applicants resulted in an award of attorney fees under the EAJA. An immigration judge had made a local practice of refusing to allow refugees seeking asylum and withholding to file their applications, alleging nonexistent deficiencies in these documents. The INS District Counsel was aware of the IJ's illegal practice but did nothing to stop it until a suit was filed by discouraged applicants seeking an injunction against the practice. Nine days before the hearing on the injunction, the chief immigration judge suspended the right of the disputed judge to receive asylum applications and stayed deportation orders of aliens whose applications he had refused to accept. As a result, the class action was dismissed as moot.

The plaintiffs then sought attorney fees under the EAJA as the prevailing parties. The court held that plaintiffs were entitled to attorney
fees, despite the fact that their suit was mooted, since (1) they had achieved the practical outcome which they sought through the lawsuit, and (2) the IJ’s position was clearly not “substantially justified,” but was contrary to the INA. The court awarded plaintiffs over $60,000 in attorney fees against the office of the errant judge.

D. Exclusion and Deportation on the Basis of HIV Positive Test

As mentioned in last year’s review, all applicants for immigrant or fiance visas, as well as those applying for refugee status, legalization under IRCA, or adjustment of status must undergo HIV testing. INA § 212(a)(6). 52 Fed. Reg. 32,540 (1987). Children under 15 are generally exempted. Applicants who test positive for the AIDS virus will be considered excludable; however, under certain circumstances, waivers of excludability may be available. INA § 245(a)(2)(K). 8 C.F.R. § 103.4. During 1988, the INS issued two cables describing eligibility for these waivers. The first cable, on March 2, 1988, sent by James A. Puleo, INS Assistant Commissioner for Examinations explained that aliens who have tested positive for the virus and who are applying for immigrant and fiance visas are not eligible for a waiver. For those applying for refugee status, for legalization applicants and non-immigrants, Mr. Puleo stated that there is statutory authority for a waiver. However, the applicant must show that he or she meets certain conditions in order for INS to grant the waiver. INS regulations provide for waivers on only three grounds: (1) in the interests of family unity, (2) when the waiver serves a humanitarian purpose, or (3) when a waiver is otherwise in the public interest. INA § 245a(2)(k)(2). 8 C.F.R. § 103.4. Further, Mr. Puleo stated that waivers will be granted only if the alien meets the following, additional conditions. The applicant must show that the danger to public health from his or her admission is minimal, that the possibility of spread of infection from his or her admission is minimal, and that no cost will be incurred by the U.S. government (“any level of government agency of the United States”) as a result of the person’s admission without prior consent of the relevant agency.

A subsequent cable, issued August 22, 1988, explained that applicants for legalization who have tested positive should request a waiver of excludability on Form I-690, giving detailed reasons why they fulfill the statutory requirements for waiver as well as the additional conditions.

E. Suspension of Deportation

INA § 244(a)(1) provides that aliens who have been physically present in the United States for a continuous seven-year period may be eligible for suspension of deportation. Suspension of deportation is granted to
aliens who are persons of good moral character, who meet the “physical presence” requirements, and who can show that their deportation would result in extreme hardship to immediate relatives who are U.S. citizens or legal permanent residents of the United States. In *INS v. Phinpathya*, 464 U.S. 183, 104 S. Ct. 584, 78 L. Ed. 2d 401 (1984), the Supreme Court took a very narrow view of what constitutes “continuous presence.” It interpreted the plain meaning of the relevant INA section as barring this relief to an alien who had been absent from the United States for a three-month period, even though she maintained a residence and intended at all times to return to the United States. The Court overruled the Court of Appeals’ criterion for “continuous physical presence,” which turned on the intention of the alien and whether the alien’s absence was “meaningfully interruptive” of his or her continuous residence in the United States.

The legislative history of IRCA § 315(b) modifies the Supreme Court’s concept of continuous presence in *Phinpathya*. Pub. L. No. 99-603, U.S. Cong. Code Ad. News 5649, 5682 (1986). INA § 244 was amended by IRCA so that brief, casual, and innocent absences do not break continuity of residence for immigration purposes.

In *De Gurules v. INS*, 833 F.2d 861 (9th Cir. 1987), the Court of Appeals addressed which standard of “continuous presence” should apply for purposes of suspension—*Phinpathya* or the new IRCA standard. The immigration judge had applied the *Phinpathya* standard, and the BIA affirmed, denying suspension to the alien petitioner. In 1986, the petitioner applied for review under INA § 106(a). The case was argued in the Ninth Circuit after Congress enacted IRCA. Even though the petitioner had not made any arguments for retroactive application of the IRCA standard, the Ninth Circuit held that the new standard applied and remanded the case to the immigration judge for adjudication using the more liberal, IRCA definition of “continuous presence.”

**VIII. Employer Sanctions and Discrimination**

During 1988, the INS began to enforce IRCA’s mandatory employment verification provisions and to impose sanctions against employers who hire undocumented workers. 1988 also saw the first litigation under the IRCA prohibitions against discrimination in employment on the basis of national origin or citizenship status. Although the INS claimed that the vast majority of employers are complying with the IRCA verification provisions, independent survey data indicated that many employers are unfamiliar with the law’s requirements and are, in fact, discriminating against job applicants who appear to be foreigners. Of those employers
who were familiar with the verification requirements, many expressed 
confusion about whose identity needed to be verified and about how to 
do it. As a response, the government began investigating the feasibility 
of automated verification. Federal Court Rulings confirmed that, al-
though IRCA prohibits unauthorized work, undocumented workers hired 
before IRCA went into effect enjoy the full protections of the Fair Labor 
Standards Act.

A. Employer Sanctions

INA § 274A provides for fines and other civil penalties against em-
ployers who either fail to comply with the paperwork requirements of 
IRCA (completing and retaining I-9 forms on all employees) or who 
knowingly hire aliens who do not have authorization to work. For em-
ployers who have a pattern and practice of violations, IRCA § 274A(f) 
mandates criminal penalties.

In United States v. Mester Manufacturing Co., Case No. 87100001 
(OCAHO) (June 17, 1988), an administrative law judge (ALJ) rendered 
the first decision on the merits of an employer sanctions case under INA 
§ 274A. After two inspections, the INS brought 17 charges against a 
furniture maker in El Cajon, California. At the time of the inspections, 
INS agents informed Mester that some employees might be unauthorized. 
Mester argued that he had asked the INS for guidance on I-9 procedures, 
but they had not responded. The INS contended that Mester had an 
affirmative duty to comply with the IRCA requirements on his own, 
without awaiting further instructions. The court held that the employer 
bears the burden of complying with the statute: “A good faith affirmative 
defense is unavailable to a charge of violating INA § 274A(a)(2) where 
the employer has failed to establish compliance with the employment 
verification system, regardless of whether the error was one of omission 
or commission.”

The court also observed that employees’ errors in filling out the I-9 
form are charged against the employer. Thus, Mester had a duty to make 
inquiries of suspect employees and to fire those without employment 
authorization; he should not have waited for INS instructions. The ALJ 
fined Mester $500 each for six counts of violating § 274(A)(a)(2) and 
8 C.F.R. § a.3, “continuing to employ an individual hired after November 
6, 1986, knowing that the employee has become an unauthorized alien.” 
The court also issued a cease and desist order against the errant company. 
On August 1, 1988, Mester Manufacturing Company filed a petition for 
judicial review of the ALJ’s decision and order under INA § 274A(e)(7). 
Mester Manufacturing Co. v. United States, No. 88-7926 (9th Cir. 1988).
By October, 1988, the INS had issued 720 notices of intent to fine against employers. Even domestic work arrangements were not immune from civil penalties. In November, 1988, the INS fined a Texas couple $250 for knowingly hiring an undocumented maid.

Many employer sanctions cases were settled before reaching the administrative law judge. In several instances, an employer who received an INS notice of intent to fine chose not to contest the civil penalties. Other employers contested the penalties but reached a settlement with the INS before the scheduled hearing date before the ALJ. Such settlements became so commonplace that an ALJ was prompted to specify the exact procedures which the parties should use and the language necessary for such accords to terminate these civil matters. See 28 C.F.R. § 68.10. U.S.A. v. Sea Garden Beach and Tennis Resort, Case No. 88100099 (OCAHO) (1988).

Criminal penalties were assessed in Day Co. Food Inc., Cr. No. 88-00253-A (E.D. Va. 1988). The INS charged the employer, who operated Wendy's restaurants along the Eastern seaboard, with a pattern or practice of hiring undocumented workers because the company had employed undocumented workers for at least two months at two different restaurants; the INS also alleged that documents presented by some of the employees were such that a "reasonable person" should have realized they were not evidence of work authorization. The company pled guilty and agreed to pay a $60,000 fine.

In December, 1988, the INS responded to several requests under the Freedom of Information Act and made public its Publication M-278, the Employer Sanctions Enforcement Manual. The Manual describes detailed procedures for educational visits to employers, as well as for two types of enforcement operations: (1) focused investigations of certain employers and (2) compliance audits of I-9s among randomly selected employers. In practice, the two enforcement techniques are frequently combined.

To begin focused investigation of an employer, the INS must have both "leads" and "articulable facts" to suspect that the employer is in violation of the immigration laws. Leads can be based on informants' tips, electronic surveillance or information gained through other agencies, such as state unemployment or tax offices. The "articulable facts" requirement may be satisfied by an INS agent's knowledge that an area has a high concentration of undocumented people, by observation of employees' apparent inability to speak English or by employees' evident nervousness or studied composure around the agents.

Compliance audits of randomly-selected employers do not require "articulable facts." If an employer is selected for inspection, the INS must provide three days notice, unless the INS has probable cause to suspect
a violation and has obtained a search warrant. The employer may waive the notice period. If the employer refuses to allow an on-site inspection of employees' I-9 forms, the INS can seek an administrative subpoena or a civil warrant for their production. 8 C.F.R. § 287.4.

As part of a combined enforcement operation, INS agents frequently interrogate employees before conducting an audit of the I-9 forms. Since the INS is under no affirmative obligation to seek the employer's or employees' consent before conducting these inquiries, many unwary individuals and corporations unwittingly aid the INS. The INS seems to assume that many employers have hired workers for whom they have not executed I-9 forms. To identify these workers, the INS prepares a subpoena before an audit and serves the subpoena during the audit even if the employer states that all required forms have been furnished to the INS. To date, the INS has successfully brought actions against recalcitrant employers to compel production of documents sought under a subpoena. See In re Silvestro, MBD No. 88-231 (D. Mass. 1988).

B. Verification of Work Authorization

Since the passage of IRCA, the INS has become increasingly concerned about possible use of fraudulent work authorizations or other fraudulent immigration documents. INA § 274A(b) requires only that any work authorization document presented to an employer "reasonably appears on its face to be genuine." Employers are not held liable for hiring workers whose documents later turn out to be fraudulent. In several jurisdictions, the U.S. Attorney has brought criminal charges against workers for submitting false documents and/or misusing immigration documents, under 18 U.S.C. § 1546. For example, in United States v. Sanchez et al., Crim. No. 88-22 (S.D. Iowa 1988), several aliens were charged with misuse of a green card (violating 18 U.S.C. § 1546) and with using false social security numbers (a violation of 42 U.S.C. § 408(g)(2)) for the purposes of tax withholding.

INA § 274A(c) explicitly prohibits the institution of a national identity card. However, INA § 274(d) authorizes the President to investigate and implement a new system to verify work authorization. In the interest of such verification, the INS created "Operation Cooperation," which encouraged employers to call the local INS office to check on employment authorization for prospective alien workers. In a March, 1988 settlement, the INS agreed to a halt of this program throughout the nation. Salinas-Pena v. INS, No. 86-1033 (D.C. Or., Mar. 15, 1988). The federal district court prohibited INS offices from responding to such requests for verification without employees' explicit, written consent. Also as a result of
this settlement, the INS agreed to develop a standard form for aliens requesting work permission from INS offices.

INS regulations promulgated as part of the employer sanctions system stated that all temporary work authorizations would expire either on the date stamped on the document, or on June 1, 1988, whichever was sooner. 8 C.F.R. § 274.14(c). The reasoning behind this regulation was that by June, 1988, the INS hoped to have worked out a “standardized employment authorization document.” 53 Fed. Reg. 20086 (1988). On June 1, 1988, 8 C.F.R. § 274.14(c) was stayed and suspended indefinitely, while the INS continues exploring possibilities for a standard document.

The Justice Department and the General Accounting Office (GAO) investigated the possibility of verifying employment authorization by telephone. The Justice Department study, released in November of 1987, favored a verification system similar to the SAVE program for checking eligibility for public benefits. In the proposed system, employers would be given information on the validity of employees’ social security numbers. The study recognized, however, that the INS files on aliens are not organized by social security number. Rather, files are indexed by I-94 or A-number, so that the proposed system could be extremely burdensome. Moreover, the study noted that confidentiality problems are sure to arise in any verification system. While these problems were recognized, the Justice Department document did not propose a definite solution for them.

In March, 1988, the GAO recommended using only social security numbers for checking work authorization. However, a pilot program in Texas has already shown that this method is not cost-effective. Thus, further feasibility studies are being conducted, with a further pilot study planned for 1989.

C. Discrimination in Employment

INA § 274B prohibits employers from discriminating against employees or job applicants on the basis of their national origin or non-citizen status. An alien who has encountered such discrimination may bring a complaint against the employer to the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Those protected by § 274B include legal permanent residents, refugees, asylees, and amnesty applicants who have filed a notice of intent to become U.S. citizens on Form I-772.

For amnesty applicants, two important questions arose concerning when these statutory protections attach. First, are aliens who have applied for amnesty protected before their legalization applications are accepted?
Second, to be protected, must an amnesty applicant have filed Form I-772 before the alleged discrimination takes place?

In one of the first cases to address these issues, an ALJ ruled against the employee, who had suffered the alleged discrimination after applying for legalization, but before being granted temporary legal resident status. *Romo v. Todd Corp.*, Case No. 87200001 (OCAHO) (Aug. 19, 1988). The court held that the worker did not qualify for the protections of INA § 274B since she was not an “intending citizen” at the time of the alleged discrimination, which took place three months before she became a temporary legal resident.

However, on November 30, 1988, the OSC published a final rule which resolves these questions in exactly the opposite fashion. 53 Fed. Reg. 48,248, amending 28 C.F.R. § 44.101(c)(2)(ii). According to the final rule, the anti-discrimination provisions take effect from the date that a candidate for legalization files his or her amnesty application, provided that the application is eventually approved. Thus, for example, if an alien applies for amnesty on June 1st, suffers employment discrimination on July 1st and files a timely complaint with the OSC on July 9th, the alien’s discrimination complaint will be heard by the OSC even though his or her application for amnesty is not approved until August 30th. However, before the applicant’s complaint will be heard, he or she must file a Form I-772. The form need not be filed before the discriminatory act, but it must be filed before alien brings a complaint to the OSC, or in our example, before July 9th.

In 1988, discrimination complaints were brought against several airlines, health care providers and defense businesses. In April, 1988, the OSC charged American Airlines, Northrop Corporation and Northrop’s contractors with discrimination. The complaint charged that these employers required proof of legal permanent resident status (a green card) or proof of citizenship for employment. The suit was settled in August, 1988. The defendants were required to give back pay to 33 alien flight attendants and to pay $17,000 in civil penalties to the government. Pan American Airlines and United Airlines settled similar suits earlier, also requiring payment of back pay.

Few discrimination complaints were filed in 1988. As of November 9, 1988, the OSC had received only 331 complaints. The small number of complaints is especially surprising given the extent of discrimination manifested in the results of an independent employer survey. See “Employer Sanctions Lead to Discrimination in New York,” 2 *The Advisor* 7-8 (1988).

On November 5, 1988, the *New York Times* reported results of an investigation conducted by the New York Governor’s Task Force on
Immigration Affairs concerning the effects of IRCA’s employer sanctions, *Workplace Discrimination Under the Immigration Reform and Control Act of 1986: A Study of Impacts on New Yorkers*. The study, which tallied responses of 400 randomly selected employers in the New York City area, found that few employers are well-informed about the employer sanctions laws. Less than one-quarter of those surveyed were knowledgeable about the I-9 requirements. Fifteen percent knew that they could be fined for hiring undocumented workers, but did not know how to avoid the fines.

Moreover, the investigation showed that many employers discriminate against job applicants who appear to be foreigners. Seven percent of the respondents admitted that they had required additional documents from job seekers whose speech seemed non-native. Seven percent also stated that they had refused to employ candidates who appeared to be foreigners.

A large-scale study by the GAO confirmed the prevalence of discrimination against immigrants in employment. *See Immigration Reform: Status of Implementing Employer Sanctions After Second Year*, U.S. GAO No. GGD-89-16. The GAO study surveyed 4000 employers; researchers also reviewed discrimination claims filed with federal and state agencies. Results showed that 16 percent of employers asked only foreign-appearing persons for work authorization, or made a practice of hiring only U.S. citizens. Like the New York study, the GAO’s investigation uncovered considerable ignorance about the provisions of IRCA. Of employers queried, 42 percent were unaware that IRCA had been enacted or did not understand the employer sanctions provisions.

These results are in sharp contrast to INS claims that the vast majority of employers are knowledgeable about the I-9 requirements and are voluntarily complying with them. At an October, 1988 press conference, INS Commissioner Alan Nelson stated that, based on INS random audits, 94 percent of employers are following the provisions of IRCA.

**D. Application of Federal Labor Protection Laws to Alien Workers**

Several recent cases confirmed that federal labor laws also apply to aliens. In a 1987 case, undocumented farmworkers charged Texas contractors and growers with violations of FLSA and the Migrant and Seasonal Workers Protection Act (MASAWPA) under 29 U.S.C. §§ 20 and 1801, respectively. *In re Reyes*, 814 F.2d 168 (5th Cir 1987). The federal district court ordered the plaintiffs to respond to discovery concerning their immigration status, since the defendants contended FLSA and MASAWPA did not apply to undocumented workers.
The workers petitioned the Court of Appeals for a writ of mandamus ordering the lower court to withdraw its discovery order. The Court of Appeals held that "it is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant." 814 F.2d at 170. The Court of Appeals held that undocumented workers are covered by labor protections, under 42 U.S.C. § 2996e(b)(1)(B). The defendants petitioned the Supreme Court for certiorari in Griffin & Brand of McAllen v. Reyes, No. 87-1609, which was denied on June 30, 1988.

In Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988), rev'g, 660 F. Supp. 1528 (N.D. Ala. 1987), cert. denied, 109 S.Ct. 1120 (1989), the lower federal court rejected the logic of In re Reyes, holding that the application of wage protections to undocumented workers was totally without precedent. 660 F. Supp. at 1529.

In Patel, a former motel worker sued his former employer for back pay and liquidated damages under FLSA. The main question for the court was whether the plaintiff, as an undocumented worker, was protected by the minimum wage laws during his pre-IRCA employment. The federal district court held for the employer, who argued that by enacting IRCA, Congress has shown that undocumented workers do not have standing to bring claims under the federal labor laws. The court ruled that undocumented employees are a separate, illegal and unprotected labor force; allowing such workers the protection of federal labor laws would be contrary to policy underlying the federal immigration laws. In particular, such protection would be contrary to the intent of Congress in enacting the employer sanctions provisions of IRCA.

The court of appeals reversed and held that FLSA makes no distinction between undocumented workers and those working with proper work authorization. Both groups can sue and recover under FLSA.

The court of appeals' interpretation of Congressional intent in enacting IRCA was in marked contrast to that of the lower court. The court of appeals reasoned that Congress sought to discourage employers from hiring undocumented workers by enacting IRCA. This policy is best served by allowing undocumented workers the protection of the federal labor laws, since if undocumented workers had no way to protest ill treatment from employers, they would constitute an attractively docile and vulnerable workforce. Thus, lack of FLSA protections, the court held, would in fact, encourage employers to hire and exploit this vulnerable work force. Employers could pay such workers less and threaten to report them to the INS if they complained.
The court of appeals also held that the defendant could not restrict plaintiff's back pay to periods during which the plaintiff had authorization to work in the United States.

In a case scheduled for trial in 1989, EEOC v. Tortilleria “La Mejor”, Civ. No. CV-F-87-505-REC (E.D. Cal.), Alicia Castrejon, an undocumented worker, took a maternity leave from her job. When her employer refused to reinstate her after her child was born, Ms. Castrejon filed a sex discrimination suit under Title VII of the Civil Rights Act. She has also filed for amnesty under IRCA. In her sex discrimination suit, Ms. Castrejon seeks back pay for the time she has been prevented from working, as well as reinstatement to her job. The employer contends that Ms. Castrejon is not protected by Title VII, for reasons that are very similar to those put forth in Patel—in enacting IRCA, Congress did not intend for undocumented employees to enjoy the protections of federal labor laws. Given the holding in Patel, and the Supreme Court’s denial of the employer's petition for certiorari, it seems that this argument is likely to be rejected by the court.
PART 1

Immigration Reform