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Divider Title: **53**

EEO ISSUES

1. ISSUE STATEMENT: The Immigration and Naturalization Service (INS) is currently litigating a class action suit filed by African-American Criminal Investigators alleging discrimination in the areas of hiring, promotions, training and disciplinary actions.

2. STATUS: The class action is presently in the discovery stage of the process in which information in being gathered and exchanged by the class and Service attorneys. The discovery stage is estimated to take a minimum of 6 months. In March 1994, the Department agreed to an expansion of the class of African American complainants to include 814 current and former officers in the Border Parol, Investigations, Detention and Deportation, Inspections, and Examinations offices.

3. DEPARTMENT POSITION: The DOJ Counsel has provided assistance to INS in the class litigation and has assigned litigation support. Every effort will be made to address the complaint issues in a fair and equitable manner.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS: Congressman John Conyers, Jr. requested that INS conduct an inquiry into the its hiring practices of African-Americans within the ranks of the Officer Corps and Senior level management positions. In April 1993, the INS formed a Task Force which conducted a review of the employment practices of the agency relating to African-Americans in Officer Corp positions.

As a result of the Task Force Report, the following actions have been undertaken:

- Senior managers have received EEO training covering EEO Laws and Principles, Alternative Staffing Procedures, Manager Accountability and Cultural Diversity.
- Selections at underrepresented INS field offices are subject to oversight and review by the EEO Office.
- The Service is conducting targeted recruitment nationwide to increase minority representation in the applicant pools for Officer Corps positions.
- Minority two- and four-year colleges in the Midwest and Southwest have been targeted for minority recruitment activity.
- The INS Affirmative Employment Program Plan is in the final stages of development and will implemented by the third quarter of FY '94.
- The plan will focus on targeted recruitment of minorities and women and the elimination of barriers which hinder minorities and women from reaching supervisory and management positions.

- An EEO Advisory Council has been established for INS. The Council will provide input to the INS Commissioner regarding the effectiveness of the employment and training processes.

- Additional resources have been allocated to the Office of EEO this fiscal year.

- The Border Patrol and Service Training academies have instituted a training module which addresses the areas of ethics and professionalism. In addition to the training module, mentoring will be used in field locations to ensure that INS Officers uphold prescribed ethics standards.

- Guidance on Professionalism and Ethics standards was provided to each Service employee in February 1993. An update is provided on a yearly basis. This information is disseminated from the Office of General Counsel.

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EMPLOYER SANCTIONS

1. **ISSUE STATEMENT:** Increased enforcement of the employer sanctions and civil document fraud provisions of the Immigration and Nationality Act will aid in preserving employment opportunities for authorized workers and in reducing illegal immigration to the United States.

- The Immigration and Nationality Act (Act) contains two provisions designed to preserve employment opportunities for authorized workers, and make it more difficult for undocumented aliens to work in the United States. These sections are Section 274A and Section 274C. Section 274A contains the Employer Sanctions provisions of the Act which require employers to verify the employment authorization status of employees and prohibits the knowing hire of unauthorized workers. Section 274C imposes penalties for various offenses relating to fraudulent documents, including their use to obtain benefits under the Immigration laws, or to obtain employment.

- Section 274A was added to the Act in 1986 as part of the Immigration Reform and Control Act which also provided an opportunity for hundreds of thousands of unauthorized aliens to legalize their status. Section 274C was enacted as part of the Immigration Act of 1990, and was designed to allow civil proceedings, in addition to criminal prosecutions, to act as a deterrent to the proliferation of fraudulent documents.

- The Employer Sanctions provisions have generated some controversy in that critics have charged that they have led to employment discrimination against persons of foreign appearance or background. In addition, the employment verification system has been criticized as being too complex for employers to understand, and as providing for too many documents which are acceptable for verification purposes. The Service has also been criticized for pursuing penalties against employers who have committed verification violations, although not necessarily violations involving the knowing hire of unauthorized aliens.

2. **STATUS:** The Service is taking measures to simplify the employment verification process by significantly reducing the number and types of documents which will establish employment eligibility and assessing a Telephone Verification System Pilot (TVS) which allows selected employers to verify INS documents presented at the time of hire. It is anticipated that these initiatives will increase compliance by employers, while reducing employment discrimination alleged to be caused by the complex nature of the employment verification system.

The Service also has plans, through its FY 95 Immigration Initiative, to significantly increase its enforcement efforts in the areas of employer sanctions and civil document fraud. Although the initiative is subject to Congressional approval, it is anticipated that these efforts will have a deterrent effect against the knowing hire of unauthorized aliens and the knowing use of fraudulent documents by aliens, particularly for verification of employment eligibility. The Service plans to increase (by over 300 positions) the number of persons, including agents, attorneys, and support staff, involved in the enforcement of Sections 274A and 274C.

3. **DEPARTMENT POSITION:** The Department supports both the efforts to simplify the employment verification process for employers, as well as the efforts to reduce the use and availability of fraudulent documents.

4. **JUDICIARY COMMITTEE MEMBERS INTEREST/POSITION:** Senator Alan Simpson was a co-sponsor of the Immigration Reform and Control Act of 1986. He also sponsored the Immigration Act of 1990 which contained the civil penalties for document fraud. He continues to be concerned about fraudulent documents. Senator Kennedy is concerned about discrimination which may be caused by confusion over documents. Senator DeConcini is opposed to employer sanctions because he believes that the business community should not be responsible for enforcing immigration laws. In the last session of Congress, Senator Hatch introduced legislation that would repeal employer sanctions. In general, however, there appears to be widespread support for simplifying the employment verification system for employers.

5. **REFERENCE MATERIALS:**

o **Key public document(s):** Proposed Rule entitled "Control of Employment of Aliens" published at 58 Fed. Reg. 61,846 (Nov. 23, 1993).

o **Excerpts from relevant statutes or bills:** Section 274A and Section 274C (8 U.S.C. § 1324a; 8 U.S.C. § 1324c); *See also* H.R. 3362, proposed by Representative Mazzoli on October 26, 1993, and referred to the House Judiciary Committee; H.R. 1031, proposed by Representative Beilenson.

o **Recent document(s) reflecting DOJ's position:** Testimony of then-Acting Commissioner Chris Sale entered into the record before the House Judiciary Committee Subcommittee on International Law, Immigration and Refugees regarding Employer Sanctions (June 16, 1993); FY 95 Immigration Initiative (budget documents).

Proposed Rules

Federal Register
Vol. 58, No. 224
Tuesday, November 23, 1993

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 210, 245a, and 274a

[INS No. 1399-92]

RIN 1115-AB73

Control of Employment of Aliens

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This is a proposed rule to reduce the number of INS-issued documents that are acceptable for purposes of completing the Employment Eligibility Verification Form (Form I-9). This rule is proposed to further simplify compliance with the employment eligibility verification requirements and to address the concerns of employers who allege confusion created by the number of acceptable documents on the Form I-9. Reduction in the number of acceptable documents should reduce any uncertainty on the part of employers, and thereby reduce potential employment discrimination based upon misapplication of the employment eligibility verification requirements.

DATES: Written comments must be submitted on or before December 23, 1993.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street NW., room 5307, Washington, DC 20536. To ensure proper handling, please reference INS number 1399-92 on your correspondence.

FOR FURTHER INFORMATION CONTACT: Michael C. McGoings, Associate General Counsel, Immigration and Naturalization Service, 425 I St. NW., room 6100, Washington, DC 20536, telephone (202) 514-2895.

SUPPLEMENTARY INFORMATION:

Statutory and Regulatory Authority

Part 274a, originally published as a final rule in the **Federal Register** on May 1, 1987, 52 FR 16216, was necessitated by section 101 of the Immigration Reform and Control Act of 1986, Public Law No. 99-603, 100 Stat. 3359 (1986) (IRCA). Section 101 of IRCA added to the Immigration and Nationality Act (Act) provisions relating to the control of employment of aliens in the United States, generally referred to as employer sanctions. Since implementation of these provisions on June 1, 1987, the Immigration and Naturalization Service (INS or Service) has reviewed numerous public comments, reports, and proposals recommending improvements to the employer sanctions procedures. The regulations have been revised on several occasions since 1987. See, *e.g.*, 56 FR 41767 (Aug. 23, 1991).

The Employment Eligibility Verification Form (Form I-9) is the linchpin of the employment eligibility verification system set forth at section 274A(b) of the Act. That section provides that the employer must verify, for every employee hired after November 6, 1986, that the person is not an unauthorized alien. There are three categories of documents that are acceptable for Form I-9 purposes. The first category is referred to as "List A" documents. List A documents establish both a person's identity and eligibility to be employed. Currently, 8 CFR 274a.2(b)(1)(v)(A) identifies the ten (10) types of acceptable List A documents. The second category of documents is referred to as "List B" documents, which establish only identity. There are currently twelve (12) types of acceptable List B documents and they are listed in 8 CFR 274a.2(b)(1)(v)(B). Finally, the third category of documents listed in 8 CFR 274a.2(b)(1)(v)(C) is referred to as "List C" documents, which establish only employment eligibility. There are seven (7) types of acceptable List C documents. Thus, there are a total of twenty-nine (29) types of documents that are acceptable for Form I-9 purposes.

Background

One often repeated criticism of employer sanctions relates to the number of documents that are acceptable for completing the Form I-9. The General Accounting Office (GAO) stated, in its March 1988 report, that the number of acceptable work eligibility documents made it difficult for employers to judge their genuineness. Immigration Control: A New Role for the Social Security Card, (GAO/HRD-88-4, Mar. 1988). In a March 1990 report to Congress on the implementation of employer sanctions, the GAO again noted that "IRCA allows persons to use any of 17 different documents to establish work eligibility [10 types of List A documents and 7 types of List C documents]. This multiplicity can give rise to confusion and uncertainty in the minds of employers seeking to confirm whether job applicants are eligible to work." Immigration Reform: Employer Sanctions and the Question of Discrimination 62 (GAO/GGD-90-62, Mar. 1990). This theme was echoed by the Task Force on IRCA-Related Discrimination, chaired by Assistant Attorney General John R. Dunne. The Task Force's report stated "that a work verification process that relies on fewer documents, and is easier to understand, will measurably reduce discrimination." Report and Recommendation of the Task Force on IRCA-Related Discrimination, 44 (GPO 276-024, Sept. 1990).

The INS has already taken steps to address this criticism. In July 1988, the INS committed to the establishment of procedures for a uniform employment authorization policy. First, the INS limited the number and type of paper documents on which employment could be authorized. Second, the INS introduced the standardized Employment Authorization Document (Form I-688B) in 1989 and implemented it nationwide by August 1990. This document, known as the EAD, is a laminated plastic card containing a photograph and clearly noting the expiration date of, and any limitations on, an alien's work authorization. Issuance of the EAD has standardized the INS' employment authorization issuance process and permitted more accurate data to be collected and compiled relating to work authorization. Further, the EADs contain security features not found on previous INS-issued employment authorization documents that make them more resistant to tampering and fraud. Nationwide, the EAD is issued at more than 200 sites. For example, these sites include district offices, suboffices, certain airports and ports of entry, asylum offices, service centers, detention processing centers, and border patrol sector offices. Ultimately, this card will be replaced by an even more secure employment authorization document that is currently under development.

The INS has now moved to reduce to one the types of alien registration receipt cards in circulation that are acceptable as proof of lawful permanent resident status and for Form I–9 purposes. The oldest type of alien registration receipt card, designated as Form I–151, was issued prior to June 1978, and was periodically revised. There were 17 different versions of this card. These cards lack sufficient security features and are prone to tampering and fraud. Consequently, a third GAO report noted that during August and September 1989, INS agents reviewed 110 alien registration receipt cards and found 106 (96 percent) to be counterfeit. Immigration Reform: Employer Sanctions and the Question of Discrimination 66 (GAO/GGD–90–62, Mar. 1990). From March 1977, to August 1, 1989, the INS began issuing improved alien registration receipt cards, designated as Form I–551. Beginning on August 1, 1989, the INS began issuing machine-readable Forms I–551 with expiration dates and enhanced security features. The INS on May 28, 1993, published a proposed rule in the **Federal Register** at 58 FR 31000, concerning the replacement of the previously issued alien registration documents with the new type which is more resistant to fraud. The final rule, published on September 20, 1993 in the **Federal Register** at 58 FR 48775, terminates the validity of previous versions of the alien registration card effective September 20, 1994. The final rule makes those previous versions of the alien registration card invalid for Form I–9 employment eligibility verification purposes as of that date.

In addition to the improvements outlined above, the INS has determined that further steps can be taken to streamline the employment eligibility verification system by reducing the number of documents that are acceptable for Form I–9 purposes. What follows is a detailed analysis of the changes suggested in this proposed rule.

Analysis of the Proposed Rule

The INS proposes eliminating certain documents from the Form I–9. Each list of documents on the Form I–9 will be analyzed from the standpoint of the documents that the INS proposes eliminating. Note that although the documents would no longer be acceptable for purposes of completing Forms I–9, with the exception of Forms I–151, they would still be valid for the purpose for which they are issued.

List A

The INS proposes removing the following three (3) documents from List A:

Form I–688A, Employment Authorization Card

This employment authorization document is issued to those aliens who have applied for legalization under section 245A of the Act, or for benefits as a special agricultural worker (SAW) under section 210 of the Act, but who have not yet been approved. Although the Form I–688A serves as only an employment authorization document for legalization applicants, it serves as both an employment authorization document and a travel document for SAW applicants. Aliens possessing these documents will be declining in numbers as their applications for relief are either granted or denied. The INS will make a concerted effort to eliminate the backlog of SAW applications pending with the service centers. However, the INS also recognizes that pending litigation and appeals of denials of SAW status make it likely that some aspects of the SAW program will continue for some time. Therefore, aliens in possession of the Form I–688A will be issued an EAD, Form I–688B, to evidence employment authorization. Special agricultural worker applicants will be granted advanced parole under section 212(d)(5) of the Act, if they wish to travel during the pendency of their SAW application. The regulations at 8 CFR 210.4(b) and 8 CFR 245a.3(n) will be amended to delete the references to Form I–688A and to reflect that the Form I–688B can be obtained at designated INS offices, and not just at legalization offices. In addition, a new paragraph (20) will be added to 8 CFR 274a.12(c) to reflect that aliens who have applied for temporary residence under the legalization or SAW provisions of the Act are authorized for employment.

Form I–327, Re-Entry Permit

Aliens in possession of this document are lawful permanent residents and, as such, are in possession of alien registration receipt cards. While no security concerns have been identified with this document, bearers will suffer no hardship by its elimination since they already possess an acceptable alternative document for Form I–9 purposes.

Form I–571, Refugee Travel Document

This document is issued only to aliens who have been admitted as refugees under section 207 of the Act, have been granted asylum status in the United States under section 208 of the Act, or who are lawfully admitted for permanent residence. These individuals may obtain an EAD, Form I–688B, in accordance with 8 CFR 274a.12 (a)(3) or (a)(5), or, when statutorily eligible, they may adjust their status to lawful permanent resident aliens, thereby becoming entitled to an alien registration receipt card, Form I–551, in accordance with 8 CFR 274a.12(a)(1).

List B

The INS proposes combining two (2) document categories and removing the following five (5) documents from List B:

Proposed Combined Documents

Driver's Licenses and Identification Cards

Certain redundancy is present in two categories in List B. 8 CFR 274a.2(b)(1)(v)(B)(*1*)(*i*) states that certain driver's licenses and identification cards are acceptable evidence of identity. 8 CFR 274a.2(b)(1)(v)(B)(*1*)(*v*) also permits certain identification documents to be used as acceptable evidence of identity. The INS proposes combining these two categories. The INS has received numerous inquiries concerning local documents such as fishing licenses, which arguably contain sufficient identifying information to satisfy the regulatory definition. However, these documents are issued through a process that does not preserve the document's security. All states now issue identification cards, thereby permitting the elimination of local identification documents.

Proposed Eliminated Documents

School Identification Cards

The myriad of school identification documents adds unnecessary complexity and confusion to the employment eligibility verification system. Students may obtain either a state driver's license or identification card, or, if they are under the age of 18, their parents or legal guardians may attest to their identity in accordance with 8 CFR 274a.2(b)(1)(v)(*B*)(*3*).

Voter's Registration Cards

On June 25, 1990, the INS published an interim rule in the Federal Register at 56 FR 25928, removing this document as an acceptable identity document for Form I–9 purposes because it lacks the proper indicia of identity, such as a photograph or other personal identifying information, that would qualify it as an acceptable List B document. However, based on a comment submitted that indicate that some individuals' sole identity document is their voter's registration card, the voter's registration cards was reinstated, as an acceptable List B document, in the final rule published on August 23, 1991, at 56 FR 41767.

The problem of document fraud and the need to simplify the Form I–9 process now mandate that the voter's registration card be removed from List B. The INS has continued to doubt the acceptability of a voter's registration card to establish identity. Most contain very little identifying information, and the issuance process is quite insecure. In addition, some local governments now allow non-citizens to vote in local elections. See Los Angeles Times, November 13, 1991, at B7, col. 1 (reporting that in Takoma Park, Maryland, voters approved a measure to extend the right to vote in municipal elections to residents who are not United States citizens; noting that Somerset, Maryland, has permitted non-citizen voting in local elections for decades; and further reporting that in New York and Chicago, parents of children in public schools may vote in school board elections regardless of citizenship). Persons in possession of voter's registration cards should be able to obtain appropriate alternative documents to comply with the requirements of the employment eligibility verification system. Moreover, the group referred to in the regulation was restricted to a small group of employees in one particular company.

U.S. Military Documents

The necessity to streamline the employment eligibility verification system has caused the INS to propose eliminating documents that are not capable of specific definition and whose bearers could readily obtain alternative documents. Military identification fits both criteria. The INS has never specifically defined what was included within this regulatory provision because the types of military identification are too numerous. In addition, members of the armed services should already possess or readily be able to obtain other documents that remain acceptable for completion of Forms I–9.

U.S. Coast Guard Merchant Mariner Cards

This document is issued only to United States citizens and aliens lawfully admitted for permanent residence. Citizen merchant mariners can obtain a social security card combined with an identity document, or a U.S. passport. Lawful permanent resident alien merchant mariners should already possess a Form I–551.

Documents for Individuals Under the Age of 18

The current regulations at 8 CFR 274a.2(b)(1)(v)(B)(*2*) permit three (3) additional types of documents to be used by minors under the age of 18 to establish identity. These are: school records or report cards; clinic, doctor, or hospital records; and day-care or nursery school records. Originally, these documents were included on Form I–9 to address those situations where children are involved in employment situations. However, this class of employee is quite small in relation to the total number of persons hired for employment in the United States each year. In addition, a perfectly acceptable alternative exists for these minors. Under 8 CFR 274a.2(b)(1)(v)(B)(*3*), minors under the age of 18 are exempt from producing an identity document if their parent or legal guardian attests on the Form I–9. Therefore, these minors are capable of satisfying the employment eligibility verification requirements without having to produce any identity document.

List C

The INS proposes modifying the regulatory language relating to one (1) document and removing the following three (3) documents from List C:

Forms FS–545 and DS–1350, Certificates of Birth Abroad

United States citizens born abroad would be able to obtain other documents that U.S. citizens may obtain, such as the combination of an identity document and a social security card, or a U.S. passport.

Form I–197, U.S. Citizen I.D. Card

This card has not been issued since the early 1980's. Persons in possession of this document would be able to obtain other documents that United States citizens may obtain, such as the combination of an identity document and a social security card, or a U.S. passport.

Form I–179, I.D. Card For Use of Resident Citizen in the United States

This document has not been issued since the 1970's. Persons in possession of this document would be able to obtain other documents that U.S. citizens may obtain, such as the combination of an identity document and a social security card, or a U.S. passport.

In accordance with 5 U.S.C. 605(b), the Commissioner of the Immigration and Naturalization Service certifies that this rule does not have a significant adverse economic impact on a substantial number of small entities. This rule is not considered to be a major rule within the meaning of section 1(b) of E.O. 12291, nor does this rule have Federalism implications warranting the preparation of a Federalism Assessment in accordance with E.O. 12612.

The information collection requirements contained in this rule have been cleared by the Office of Management and Budget under the provisions of the Paperwork Reduction Act. Clearance numbers for these collections are contained in 8 CFR 299.5, Display of Control Numbers.

List of Subjects

8 CFR Part 210

Aliens, Migrant labor, Reporting and recordkeeping requirements.

8 CFR Part 245a

Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 210—SPECIAL AGRICULTURAL WORKERS

1. The authority citation for part 210 is revised to read as follows:

Authority: 8 U.S.C. 1103, 1160, 8 CFR part 2.

2. In § 210.4, paragraphs (b) (2) and (3) would be revised to read as follows:

§ 210.4 Status and benefits.

* * * * *

(b) * * *

(2) *Employment and travel authorization prior to the granting of temporary resident status.* Permission to travel abroad and to accept employment will be granted to the applicant after an interview has been conducted in connection with a nonfrivolous application at a Service office. If an interview appointment cannot be scheduled within 30 days from the date an application is filed at a Service office, authorization to accept employment will be granted, valid until the scheduled appointment date. Employment authorization, both prior

and subsequent to an interview, will be granted on Form I–688B, and will be restricted to six months duration, pending final determination on the application for temporary resident status. If a final determination has not been made on the application prior to the expiration date of the I–688B, that date may be extended upon return of the I–688B by the applicant to the Service office where it was obtained. Persons submitting applications who currently have work authorization incident to status as defined in § 274a.12(b) of this chapter shall be granted work authorization by the INS effective on the date the alien's prior work authorization expires. Permission to travel abroad shall be granted in accordance with the Service's advance parole provisions contained in § 212.5(e) of this chapter.

(3) *Employment and travel authorization upon grant of temporary resident status.* Upon the granting of an application for adjustment to temporary resident status, the service center will forward a notice of approval to the applicant at his or her last known address and to his or her qualified designated entity or representative. The applicant may appear at any Service office, and upon surrender of the previously issued Form I–688B, will be issued Form I–688, Temporary Resident Card. An alien whose status is adjusted to that of a lawful temporary resident under section 210 of the Act has the right to reside in the United States, to travel abroad (including commuting from a residence abroad), and to accept employment in the United States in the same manner as aliens lawfully admitted for permanent residence.

* * * * *

PART 245a—ADJUSTMENT OF STATUS TO THAT OF PERSONS ADMITTED FOR LAWFUL TEMPORARY OR PERMANENT RESIDENT STATUS UNDER SECTION 245A OF THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED BY PUB. L. 99–603, THE IMMIGRATION REFORM AND CONTROL ACT OF 1986, AND PUB. L. 100–204, SECTION 902

3. The authority citation for part 245a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1255a and 1255a note.

4. In § 245a.2, paragraphs (n) (2) (ii) and (3) would be revised to read as follows:

§ 245a.2 Application for temporary residence.

* * * * *

(n) * * *

(2) *Employment authorization prior to the granting of temporary resident status.*

(i) * * *

(ii) If an interview appointment cannot be scheduled within 30 days from the date an application is filed at a Service office, authorization to accept employment will be granted valid until the scheduled appointment date. Employment authorization, both prior and subsequent to an interview, will be granted on Form I–688B, and will be restricted to six months duration, pending final determination on the application for temporary resident status.

(3) *Employment and travel authorization upon grant of temporary resident status.* Upon the granting of an application for adjustment to temporary resident status, the service center will forward a notice of approval to the applicant at his or her last known address and to his or her qualified designated entity or representative. The applicant may appear at any Service office, and upon surrender of the previously issued Form I–688B will be issued Form I–688, Temporary Resident Card.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

5. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a, and 8 CFR part 2.

6. Section 274a.2(b)(1)(v) would be amended by:

a. removing paragraphs (A)(*4*)(*i*) and (A)(*5*);

b. revising paragraphs (A)(*6*), (A)(*7*), (A)(*8*), and (A)(*9*);

c. revising paragraph (A)(*10*) and redesignating it as paragraph (A)(*6*);

d. revising paragraph (B) introductory text and paragraphs (B)(*1*) and (B)(*1*)(*i*);

e. removing paragraphs (B)(*1*)(*ii*), (B)(*1*)(*iii*), (B)(*1*)(*iv*), (B)(*1*)(*v*), (B)(*1*)(*vi*) and (B)(*1*)(*viii*);

f. revising paragraphs (B)(*1*)(*vii*) and redesignating it as paragraph (B)(*1*)(*ii*);

g. revising paragraphs (B)(*1*)(*ix*) and redesignating it as paragraph (B)(*1*)(*iii*);

h. removing paragraph (B)(*2*);

i. redesignating paragraphs (B)(*3*) and (B)(*4*) as paragraphs (B)(*2*) and (B)(*3*) respectively;

j. revising paragraphs (C)(*1*);

k. removing paragraphs (C)(*2*), (C)(*3*), (C)(*6*) and (C)(*7*);

l. revising paragraphs (C)(*4*), (C)(*5*) and (C)(*8*) and redesignating them as paragraphs (C)(*2*), (C)(*3*) and (C)(*4*) respectively to read as follows:

§ 274a.2 Verification of employment eligibility.

* * * * *

(b) * * *

(1) * * *

(v) * * *

(A) * * *

(*4*) * * *

(*i*) Contains an unexpired stamp therein which reads, "Processed for I–551. Temporary Evidence of Lawful Admission for permanent residence. Valid until _______. Employment authorized" or "Temporary Form I–551. Admission for permanent residence at _______ (port)_______ (date) verified. _______ (office of issuance)_______ (date) _______ (signature of issuing officer) _______ (title)"; either stamp may be placed on the arrival portion of Form I–94, with the alien's picture affixed thereto, if the alien is not in possession of his or her passport; or

* * * * *

(*5*) An Alien Registration Receipt Card, INS Form I–551; or

(*6*) An unexpired employment authorization document issued by the Immigration and Naturalization Service which contains a photograph, INS Form I–688, or I–688B.

(B) The following documents and procedures are acceptable to establish identity only:

(*1*) The following documents, whether expired or unexpired are acceptable to establish identity only:

(*i*) A driver's license or identification card issued by the Federal Government, a state (as defined in section 101(a)(36) of the Act), or an outlying possession (as defined in section 101(a)(29) of the Act) of the United States, provided the document contains a photograph or the following information: name, date of birth, sex, height, eye color, and address;

(*ii*) A Native American tribal document; or

(*iii*) A driver's license issued by a Canadian Government authority, or a Canadian federal or provincial identification card.

* * * * *

(C) * * *

(*1*) A social security card with no employment restrictions;

(*2*) An original or certified copy of a birth certificate issued by a state (as defined in section 101(a)(36) of the Act), county, municipal authority, or outlying possession of the United States (as defined in section 101(a)(29) of the Act) bearing an official seal;

(*3*) A Native American tribal document; or

(*4*) An unexpired Form I–94 indicating admission as refugee or containing an employment authorization stamp, so long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified thereon.

* * * * *

7. Section 274a.12(c) would be amended by removing the "." at the end of paragraph (19) and replacing it with a ";" and adding a new paragraph (20) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(20) An alien who has filed an application for lawful temporary residence pursuant to section 245A or 210 of the Act. Such an alien shall apply for employment authorization only in accordance with the procedures set forth in parts 245a or 210 of this chapter.

Dated: November 16, 1993.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 93-28676 Filed 11-22-93; 8:45 am]

BILLING CODE 4410-10-M

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 574

[No. 93-60]

RIN 1550-AA63

Acquisition of Control of Savings Associations Applications, Approval Standards and Procedural Requirements

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of Thrift Supervision (OTS) proposes to amend its acquisition of control regulations to incorporate the provisions of section 211 of the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA). Section 211, which became effective upon the enactment of the FDICIA on December 19, 1991, amended Section 10(e) of the Home Owners' Loan Act (HOLA) to require that the OTS, in reviewing a holding company application under section 10(e) to acquire a savings association, consider the competence, experience, and integrity of the officers, directors, and principal shareholders of the proposed acquirors and the savings association to be acquired.

Section 211 also amended section 10(e) of the HOLA to set forth two additional circumstances under which the Director is required to deny a holding company application. First, the OTS must deny an application under section 10(e) of the HOLA if the company fails to provide adequate assurances to the OTS that the company will make available to the OTS such information on the operations or activities of the company, and any affiliate of the company, as the OTS determines to be appropriate to determine and enforce compliance with the HOLA. Second, the statute requires the OTS to deny an application by a foreign bank if the foreign bank is not subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in the home country of the foreign bank.

In addition, the OTS proposes to amend its acquisition of control regulations to reflect the previous combination of the various holding company application forms in order to provide consistency between the forms and the regulations, to eliminate confusion, and to streamline the regulations.

DATES: Comments must be received on or before December 23, 1993.

ADDRESSES: Send comments to Director, Information Services Division, Public Affairs, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention Docket No. 92-60. These submissions may be hand delivered to 1700 G Street, NW. from 9 a.m. to 5 p.m. on business days; they may be sent by facsimile transmission to FAX Number (202) 906-7753 or (202) 906-7755. Submissions must be received by 5 p.m. on the day they are due in order to be considered by the OTS. Late-filed, misaddressed or misidentified submissions will not be considered in this rulemaking. Comments will be available for inspection at 1700 G Street, NW. from 1 to 4 p.m. on business days. Visitors will be escorted to and from the Public Reference Room at established intervals.

FOR FURTHER INFORMATION CONTACT: David Sjogren, Program Manager, Corporate Analysis, (202) 906-6739, Supervisory Operations, Eileen McCarthy, Program Analyst, Thrift Policy, (202) 906-5752, Supervision Policy, Kevin A. Corcoran, Assistant Chief Counsel, (202) 906-6962, or V. Gerard Comizio, Deputy Chief Counsel, (202) 906-6411, Corporate and Securities Division, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. *Acquisition Standards*

Section 10(e) of the HOLA, 12 U.S.C. 1467a, generally prohibits any company, directly or indirectly, from acquiring control of a savings association without prior OTS approval. The OTS is required to evaluate holding company applications under the standards set forth at section 10(e) of the HOLA. In reviewing any holding company acquisition under section 10(e), the OTS is required to take into consideration the financial and managerial resources and future prospects of the company and association involved, the insurance risk to the SAIF or the BIF, and the convenience and needs of the community to be served.[1]

A. Competence, Experience, and Integrity of Officers, Directors, and Principal Shareholders

Section 211 of the FDICIA, Public Law No. 102-242, 105 stat. 2236, amended sections 10(e)(1)(B) and 10(e)(2) of the HOLA to require that the OTS, in considering the managerial resources of companies and savings associations involved in a holding company acquisition, consider "the competence, experience, and integrity of the officers, directors, and principal shareholders of the company or association."[2]

Neither the HOLA nor the OTS acquisition of control regulations defines the term "principal shareholder." The OTS acquisition of control regulations, however, define the term "controlling shareholder" as "any person who directly or indirectly or acting in concert with one or more persons or companies, or together with members of his or her immediate family, owns, controls, or holds with power to vote 10 percent or more of the voting stock of a company or controls in any manner the election or appointment of a majority of the company's board of directors."[3]

The OTS believes that the definition of the term "controlling shareholder" currently contained in its acquisition of

[1] 12 U.S.C. 1467a(e)(1)(B) and (e)(2). These standards also apply to acquisitions of stock in connection with qualified stock issuances under section 10(q) of the HOLA, and any transaction under section 13(k) of the Federal Deposit Insurance Act.

[2] *Id.* In assessing the managerial resources of proposed acquirors of savings associations, the OTS has, as a matter of practice and policy, generally interpreted this standard to require a review of the competence, experience, and integrity of proposed acquirors. Thus, the OTS believes that the new statutory requirements of section 10(e)(1)(B) and (2) are consistent with, and enhance, approval standards currently used by OTS.

[3] 12 CFR 574.2(g).

Testimony of

Chris Sale

Acting Commissioner

Immigration and Naturalization Service

before the

House Judiciary Committee

Subcommittee on International Law, Immigration and Refugees

regarding

Employer Sanctions

June 16, 1993

Rayburn House Office Building, Room 2226 at 10:00 a.m.

at the end of this testimony depicts the steady increase in the compliance rate from an initial 50 percent to the current rate of 89 percent. Fiscal Year 1992 inspections revealed that the nationwide compliance rate is approximately 89 percent, a four percent increase over last year. Clearly, many of the Nation's employers are compiling, and increasingly, are incorporating sanctions compliance into their practice. We believe that our enforcement of the employer sanctions provisions has substantially contributed to that compliance.

I shall now discuss our implementation of employer sanctions in terms of some of the adjustments we have made, our enforcement accomplishments, and the task we see ahead to achieve the goal of reducing job opportunities for unauthorized aliens.

VOLUNTARY COMPLIANCE AS THE GOAL

The goal of our overall sanctions enforcement policy is to gain voluntary compliance. To accomplish that, INS first instructed employers in their new responsibilities under the law. Although INS continues to educate new employers, compliance with the requirements for verifying the employment eligibility of workers is becoming a customary practice of doing business in the United States and thus our primary focus has shifted to enforcement.

lead-driven investigations, and (2) a reduction in the number of GAP inspections required to accurately assess compliance.

The 1991 directive remains in effect with some modification. The requirement has since been changed to a Service-wide commitment of Investigations base program resources which still meets the 30 percent level, but allows for local flexibility. The number of Border Patrol workyears dedicated to employer sanctions enforcement has been adjusted to approximately 100 workyears in keeping with dedicating patrol resources to their primary mission--protecting the border.

MEMORANDUM OF UNDERSTANDING WITH THE DEPARTMENT OF LABOR

The INS and the Employment Standards Administration (ESA) of the Department of Labor (DOL) have historically maintained an excellent working relationship in areas of mutual law enforcement interest. While the INS has primary responsibility for enforcing employer sanctions, the Immigration and Nationality Act gives DOL a role in the enforcement of employer sanctions by granting DOL officers authority to inspect employer's Employment Eligibility Verification Forms (Form I-9). To standardize the procedures used in the enforcement of employer sanctions, a Memorandum of Understanding (MOU) was formally signed on June 9, 1992, between the agencies. This MOU grants authority to DOL officers to issue Warning Notices to employers who appear to have violated the verification requirements of the Act. These procedures will monetary penalties and criminal charges for repeat violators.

- o INS is in the process of revising our debt collection process for monies due the Service, in accordance with the Debt Collection Act. Upon implementation, this process will standardize the collection and tracking of payments for employer sanctions civil monetary penalties, greatly increasing the efficiency of this process and helping to ensure that civil monetary penalties will be paid. This system is in the final stages of testing, and we anticipate that it will be implemented this fiscal year.

ENFORCEMENT ACCOMPLISHMENTS

INS employer sanctions enforcement efforts generally have been evenly directed at all segments of the business community, regardless of size or type of business. However, there are instances in which the Service focuses additional resources on business segments which have historically yielded a larger number of arrests of unauthorized aliens and/or issuance of civil monetary penalties.

- $23,400,157 in final order; and
- 46,800 employer sanctions-related apprehensions by Investigations.

CRIMINAL DOCUMENT FRAUD

The recently issued Report of the Commission on Agricultural Workers, dated November 6, 1992, and a Congressional Staff Report entitled "INS Implementation of Employer Sanctions: A Stalled Policy", dated July 21, 1992, both maintain that employer sanctions is inadequate due to the enormous availability of fraudulent documents. INS recognizes that the use of fraudulent documents has significantly undermined our enforcement of employer sanctions. In order to combat this phenomenon, Investigations has made the identification and prosecution of criminal fraud facilitators and organizations a high priority.

Undercover operations are a common tool used by INS Special Agents to gather evidence and criminally prosecute document vendors and manufacturers. In Fiscal Year 1992, approximately 236 of these undercover operations targeted individuals and/or organizations involved in INS related document fraud. Presently, the INS is pursuing over 300 undercover operations which target fraudulent document vendors and/or manufacturers. In the last three years, INS Investigations has obtained approximately 1,322 convictions for document fraud offenses.

incarceration. Only one defendant in this investigation was sentenced to a significant term -- six years in prison. The six-year sentence was imposed because the government was able to justify a departure from the sentencing guidelines. We believe that the guidelines need to be modified to allow imposition of longer, more meaningful and realistic sentences for criminal violations that represent a direct assault on the integrity of Government programs, like Employer Sanctions.

CIVIL DOCUMENT FRAUD

On November 29, 1990, Section 544 of the Immigration Act of 1990 (IMMACT 90) was enacted. This very important administrative enforcement tool allows the INS to impose both cease and desist orders and civil monetary penalties against individuals and/or entities who commit civil violations with respect to document fraud. The INS implemented this portion of IMMACT in September 1992. To date, the INS has issued over 440 Notices of Intent to Fine for civil document fraud violations against individuals, and fraud facilitators. Investigations have been initiated targeting two separate employers suspected of numerous civil document fraud violations.

ENHANCED RESOURCES FOR SANCTIONS ENFORCEMENT

We have tried to have greater impact. Pursuant to our new Memorandum of Understanding, the Department of Labor will begin document industry has developed and flourished in response to the employment eligibility verification requirements of the Act.

INS agrees with the conclusions of GAO and the Task Force on IRCA-Related Discrimination that a verification process that is easier to understand, and which relies on fewer documents, will minimize inadvertent discrimination. We also believe that fewer, and more secure, documents will reduce fraud as well as increase the effectiveness of employer sanctions. We are taking steps, therefore, to effect some changes to the verification system which focus on making the system simpler and reliant on the fewest possible number of documents.

We have begun the process of reducing the number of documents listed on the Form I-9 as acceptable. Our proposal would remove 16 of the 29 currently acceptable documents. The removal of these documents should not burden any citizen or alien authorized to work in the United States as they will have ready access to other documents which will be acceptable for purposes of verification. Of course, our recommended changes will be published in the Federal Register as a proposed rule with a public comment period.

was a critical step in gaining more effective control over illegal immigration. As a mechanism for protecting American workers from cut-rate illegal competition and protecting illegal immigrants from exploitative employers, employer sanctions was long overdue. It remains a vital part of our legal system. The deterrence it provides helps maintain the integrity of our system of legal immigration and our borders.

It is important to recognize, however, that effective immigration enforcement requires a balance of interior and border enforcement to address such concerns as the presence of criminal aliens; the use of fraudulent documents; sophisticated attempts at illegal entry; and the manipulation of the asylum process to obtain employment authorization. Increased border enforcement, alone, will not solve the Nation's illegal immigration problems.

Employer sanctions remain a vital and essential provision of immigration law and national policy. The refinements I outlined demonstrate the seriousness of the INS's commitment to their vigorous enforcement. Thank you for this opportunity to speak with you today. I will be pleased to answer any queions.

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Divider Title: **55**

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW -- Status of Hiring Efforts

ISSUE STATEMENT: Three senior positions in the Executive Office for Immigration Review (EOIR) have been vacant in recent months. The position of Chief Immigration Judge was recently filled, but the previously joint positions of Chair of the Board of Immigration Appeals and Director of the Executive Office for Immigration Review have been vacant since the retirement of former Director and Chairman David Milhollan last summer.

BACKGROUND: The Attorney General is charged with the administration and enforcement of the Immigration and Nationality Act of 1952, and all other laws relating to the immigration and naturalization of aliens. The Attorney General has delegated certain aspects of her authority to administer the interpret the immigration laws to the Executive Office for Immigration Review (EOIR). Within EOIR is the Board of Immigration Appeals (BIA), a quasi-judicial organization composed of a Chairman, four Board members, and a Chief Attorney Examiner who is also an alternate Board member. The BIA functions as an administrative appellate body, whose precedent decisions are binding on the INS, immigration judges, and, in part, the Department of State. Also under EOIR is the Office of the Chief Immigration Judge, which is responsible for the general supervision and direction of the immigration judges (IJs). The Ijs are located in field offices nationwide, and preside at formal, quasi-judicial deportation and exclusion proceedings. In previous years, the joining of the Director and Board Chairman positions has generated criticism both within and outside EOIR.

STATUS: The position of Chief Immigration Judge was recently filled by Michael Creppy, former INS Deputy General Counsel. Interviews for Board Chairman and Board Member, both Senior Level positions, were conducted by a DOJ selection team over the past several months. The Office of Personnel Management later determined that the BIA Chair position should be filled as an SES career rather than Senior level position. The Chair position was announced and closed on May 6, and the Executive Personnel Unit of the Justice Management Division will review each applicant to determine his or her qualifications. EOIR will convene an Executive Resources Board in order to evaluate the applicants and recommend the best qualified to a Senior Executive Resources Board (SERB). The name of the applicant deemed best qualified by the SERB will be forwarded to the Office of Personnel Management for approval/disapproval of his or her managerial qualifications, and ultimately to the Office of Associate Attorney General for approval.

DOJ POSITION: The Office of Associate Attorney General has been working closely with Senior Management of EOIR on issues of asylum reform, criminal aliens, improving coordination with INS, and EOIR case processing. Substantial progress has been made in these areas, and the vacancies in the positions of Board Chairman and Director present a further opportunity for the Administration to initiate a new era of leadership in this organization.

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Divider Title: **56**

INS USE OF FINGERPRINTS

1. ISSUE STATEMENT: The Immigration and Naturalization Service (INS) routinely submits fingerprints to the FBI Criminal History Record System to determine that applicants for certain benefits, including asylum, naturalization, and permanent residence, are not ineligible because of a criminal history. In fiscal year 1993, INS paid the FBI $14.7 million for 866,000 fingerprint checks.

In February 1994, the Office of the Inspector General published a report on their inspection of Alien Fingerprint Requirements in the Immigration and Naturalization Service. That inspection confirmed that fingerprint checks are necessary and recommended strengthening certain controls in the processes and better compliance with existing instructions.

Although fingerprinting provides an invaluable source of information to the adjudicative process, it is costly based on the low number of hits. In late March, due to budgetary constraints, INS initiated a 6-month test in which FBI name checks were to be requested for all applicants for benefits but fingerprint checks were to be requested only when name checks resulted in matches. This test affected only persons already present in the United States, not those entering the country. However, following widespread concern about eliminating fingerprint checks in every case, INS ceased the test and reinstituted routine submission of fingerprints for FBI record checks.

2. STATUS: In response to the IG report, INS has taken action to ensure compliance with existing instructions and has begun a comprehensive assessment of its methods for obtaining, submitting, and retaining fingerprint records. INS is currently evaluating the OIG findings and a sample of alien files. Based on this analysis, INS will make any necessary changes to improve the efficiency and effectiveness of the fingerprint process.

3. DEPARTMENT'S POSITION: The Department's OIG found that fingerprint checks are necessary and recommended that INS strengthen certain controls in the process and that it improve its compliance with existing instructions. The Department concurred with INS' reinstatement of routine FBI fingerprint checks in all cases pending outcome of the evaluation.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS: Senators Hollings and Feinstein of the Judiciary Committee, and Senator Byrd, Chairman of the Committee on Appropriations, expressed concern over the change in fingerprint policy. Senator Feinstein was concerned about the potential impact of the policy on California where close to half of all undocumented migrants live. Senators Hollings and Byrd were concerned about the impact on the President's initiative to stem illegal immigration and the budget implications for the FBI where there would have been a $3 million fee reduction offsetting INS' $3 million anticipated savings due to the reduction in FBI fingerprint checks.

5. REFERENCE MATERIALS:

INS Fingerprint Review Plan -- April 19, 1994

Fingerprint Test Bullets -- April 15, 1994

Office of the Inspector General Report, "Alien Fingerprint Requirements in the Immigration and Naturalization Service," February 1994.

U.S. Department of Justice

Office of the Inspector General

Report Number I-93-13

Inspection Report

Alien Fingerprint Requirements in
The Immigration and Naturalization Service
February 1994

DEPARTMENT OF JUSTICE
OFFICE OF THE INSPECTOR GENERAL
INSPECTION REPORT

ALIEN FINGERPRINT REQUIREMENTS IN THE IMMIGRATION AND NATURALIZATION SERVICE

February 1994
Report Number I-93-13

Most of the applications associated with these fingerprint cards were subsequently adjudicated on the basis of an FBI name check only; a fingerprint check was not conducted. The FBI allows INS to submit a new set of fingerprints at no additional cost if the first set is unclassifiable. However, we found in most cases new fingerprints were not submitted. At two district offices, we found many of the unclassifiable fingerprint cards returned by the FBI were destroyed.

INTRODUCTION

The Inspections Division, Office of the Inspector General, Department of Justice, has completed an inspection of Alien Fingerprint Requirements in the Immigration and Naturalization Service (INS). Field work was conducted from July 1, 1993, through October 15, 1993.

OBJECTIVE

The objective of the inspection was to determine the necessity and effectiveness of conducting fingerprint checks on applicants for naturalization, permanent residency, and other benefits.

SCOPE AND METHODOLOGY

The inspection examined procedures for processing applicant fingerprint cards required of aliens who apply to INS for naturalization, permanent residency, and other benefits. We also reviewed procedures for applicant fingerprint checks conducted on United States citizens who are seeking to adopt or sponsor children from other countries.

Fingerprint checks conducted on aliens arrested by INS, and on INS employees and prospective employees as part of their background investigations, were not included in the inspection. Unlike applicant fingerprint checks, the Federal Bureau of Investigation (FBI) does not charge INS a fee for criminal fingerprint checks.

The inspection team reviewed immigration laws and regulations, INS and FBI management and statistical reports, and the interagency agreement between the FBI and INS. We conducted interviews with responsible personnel from INS and FBI Headquarters, and from selected INS district and asylum offices. At district offices, we reviewed alien files for which fingerprint checks, conducted in July 1992, had identified arrest records.

The inspection was conducted at INS and FBI Headquarters, Washington, D.C.; INS district offices in Baltimore, MD; Boston, MA; San Francisco, CA; and Chicago, IL; and INS asylum offices in San Francisco, CA; and Chicago, IL.

BACKGROUND

The INS is responsible for administering and enforcing laws and issuing regulations relating to the immigration and naturalization of aliens. Title 8 of the Code of Federal Regulations (CFR), Aliens and Nationality, requires aliens to submit a complete set of fingerprints on Form FD-258, Applicant Fingerprint Card (see Appendix I), when submitting the following applications:

to determine the proper application fees based on its costs, including the user fees charged by the FBI for conducting the fingerprint checks.

After the FBI receives the completed fingerprint card from INS, it begins the fingerprint check process by determining if the upper portion of the card is complete. The upper portion includes the descriptive data of the applicant and the Originating Agency Identifier, or ORI code. Each district office, sub-office, asylum office, and service center has its own ORI code. It is used for billing purposes and for returning any reports of identified arrest records to the office which initiated the fingerprint check. If any critical information (name, date of birth, sex, ORI code) is missing from the card, the FBI rejects it immediately and returns it to INS with a standard form which explains why the card was rejected. There is no charge for cards rejected at this stage.

If the upper portion of the fingerprint card is complete, FBI technicians attempt to classify each set of 10 prints with an alphanumeric code based on the patterns of loops, whorls, arches, and ridge lines that each print makes. The FBI may not be able to classify the set if one or more of the prints are smudged or illegible, but it will still conduct a name search against the 28 million fingerprint files in the FBI criminal data base using the name and other descriptive data from the card. A name search may yield many candidates for a possible match. The FBI verifies possible matches by comparing the submitted prints to the candidate's prints taken from the data base. If an arrest record is identified ("ident"), the arrest report is attached to the fingerprint card and mailed back to the INS office which initiated the check.

Prints which are unclassifiable and not matched through a name search are returned to the originating INS office. The returned cards are stamped by the FBI, "Unclassifiable - No Record By Name." INS is still charged the $17 fee for unclassifiable prints, but the FBI permits INS to submit a second set of prints at no charge if the original prints are stapled to the second set.

After the prints are classified, the FBI will conduct a name search as they would if the prints were unclassifiable. If there is no ident from the name search, the FBI will use the fingerprint classification and descriptive data to conduct an automated search of the fingerprint files in the criminal data base. This search will detect an applicant with an arrest record who may have been missed by the name search because the applicant used a different name at the time of his or her arrest. As with the name check, if an ident is made, the arrest report is attached to the fingerprint card and returned to the originating INS office.

RESULTS OF THE INSPECTION

NECESSITY OF ALIEN FINGERPRINT CHECKS

We found fingerprint checks are necessary to detect criminal records which may make an applicant ineligible for benefits. However, changes to the current policy of conducting checks for all aliens applying for naturalization, permanent residency, and other benefits may be in order.

Need for Fingerprint Checks

Applicants for INS benefits undergo FBI fingerprint checks to determine if they possess criminal or arrest records which may make them ineligible for the applied benefits. While there is no statutory requirement to conduct a fingerprint check, the Immigration and Nationality Act (Act) does contain provisions which restrict INS benefits for individuals with criminal records. Section 316(a) of the Act, requires applicants for naturalization to be of "good moral character." Section 101(f) of the Act excludes from this category all individuals who have been convicted of an aggravated felony, drug trafficking, two or more offenses in which the aggregate sentence imposed was 5 years or more, or other crimes involving moral turpitude. The Act contains similar requirements of applicants for permanent residency, asylum, and temporary protective status.

The INS, Office of Enforcement, considers the FBI fingerprint check to be the only practical means available to positively identify any known criminal history of an applicant. While INS has access to other automated systems used to check criminal files, these are generally not available to check an applicant for criminal records. For example, the FBI operates the National Crime Information Center (NCIC) which provides INS and other law enforcement agencies with automated access to criminal records maintained by the FBI and all 50 states. INS Enforcement officials and the FBI informed us that NCIC cannot be used for routine criminal record checks of applicants. This is because many states will not allow on-line access for application purposes. NCIC may be used for updating the record of an applicant already known to have an arrest record identified through a fingerprint check.

We interviewed INS Examiners at each of the four district offices we visited. Examiners interview the applicants and adjudicate their applications. They told us they regard the fingerprint checks as necessary and an important source of information. Examiners interview as many as 20 applicants a day and may have to base their decision to grant or deny an application on an interview as short as 15 minutes. One Examiner described the checks as the only "window" they have to determine if the aliens are answering questions truthfully.

that a number of the pending applications have been abandoned by the alien because of the identified arrest record.

While we believe fingerprint checks are a necessary tool, an INS study recommends consideration of options other than the 100 percent submission of fingerprint cards to the FBI for every application.

Options

These options, while not all inclusive, would allow INS to detect most aliens who are ineligible for benefits due to their criminal history and may provide additional resources for controls over the fingerprints submitted.

Use of profiles. Under this option, INS would submit to the FBI only those alien fingerprint cards fitting a select gender or age group. This was one of the options presented in a September 1993 INS study, "Cost Savings Initiatives in Fingerprint Processing." The study cites statistics from the FBI's 1991 Uniform Crime Report (UCR) which indicate that 81 percent of all reported arrests involved males and 71 percent involved males between the ages of 15 and 44. Our review of 336 alien arrest reports supports these statistics. We found 267 arrest reports, or 79.5 percent, belonged to males and 210 arrest reports, or 62.5 percent, belonged to males between the ages of 15 and 44.

Males accounted for approximately 54 percent of the total number of immigrants admitted into the United States between 1982 and 1991. Conceivably, INS could submit to the FBI the fingerprint cards for only male applicants, save nearly half the estimated total of FBI user fees, and still detect 80 percent of the aliens with arrest records. Any cost savings could be used to strengthen controls over the fingerprint process, such as verification of the alien prints as discussed later in this report.

Officer discretion in submitting fingerprint cards. The INS study further suggests officer discretion in submitting fingerprint cards for applicants whose cards are not automatically sent to the FBI. Discretion could be based on a number of factors such as the time the alien has been in the United States; the officer's experience and knowledge of the local alien population; and the officer's impression of the alien during the interview.

Conclusion

Overall, our review found arrest records identified from fingerprint checks affect the final adjudication of an application for INS benefits. For the 41 percent of applications that were denied, withdrawn, or still pending, the identified arrest record often prevented the approval of the application. Based on our review of the Act and arrest records identified by services, most fingerprints are taken by the private vendors set up around the district offices. INS does not define what constitutes a "reputable" organization and, in most cases, would be unable to determine which organization was used because the card only contains the signature of the person taking the fingerprints and not the name of the fingerprint shop. In effect, a criminal alien, with his own ink pad, could take someone else's prints and submit the card as his own to INS. INS has no controls to prevent this type of fraud.

In addition, the instructions direct the alien to sign the fingerprint card in the presence of the person taking the fingerprints. This should allow INS to compare the signature on the fingerprint card to the signature on the application to verify it was the applicant who was fingerprinted. We do not consider this an effective control because INS cannot be certain the aliens or the private vendors are following these procedures. The alien could simply sign the card before giving the card to the imposter or have the imposter forge the signature.

The INS Examiners, who interview the aliens and adjudicate their applications, usually do not see the fingerprint cards. The cards are immediately pulled from the application after receipt by the application clerks and sent to the FBI. The FBI does not return the cards unless they identify an arrest record.

The potential for fraud with fingerprint submissions has been raised with INS Headquarters. The previously cited October 1991 memorandum from the Baltimore District Director stated that, ". . . there is always the risk that an unscrupulous outlet will deliberately switch the prints of an alien known to have an adverse history with one who is clean, thus defrauding the government."

Title 8, § 332.2, of the CFR allows for non-profit organizations to establish studios offering photographic and fingerprinting services at district offices. Of the district offices we visited, only Boston had provided space for a VOLAG to set up a booth where fingerprints were taken. The VOLAG charged applicants $4 for the service. The applicants were not required to use the VOLAG and it appears from our review of fingerprint cards that many aliens went elsewhere for fingerprinting services, despite the relatively small fee and convenience of having them taken at the district office.

Permitting VOLAGs to take fingerprints at the district offices could increase control over the fingerprints if the applicants were required to have them taken there and the VOLAGs verified the identities of the applicants. The problem we see is that the purpose of the VOLAG is to provide assistance to the applicants and not to detect fraud. A possible solution is to have an INS official verify identities while VOLAG personnel take the fingerprints.

report from the July 1992 fingerprint check at the time the application was granted, denied, or withdrawn.

Timely Receipt of Arrest Reports from the FBI. We reviewed the dates from the listings provided by the FBI for the four district offices to determine how long it took the FBI to complete the fingerprint check after it received the fingerprint card from INS. The average time for the FBI to complete the fingerprint check was 7 days.

Only the Baltimore District Office stamped the date received on the FBI arrest report. We reviewed these dates and the dates from the FBI listing for Baltimore to determine how long it took to return arrest reports to the district office after the fingerprint card was received by the FBI. The average time between the date the fingerprint card was received by the FBI and the date the FBI arrest report was received by the district office was 25 days. Based on our review, we conclude the FBI is completing the checks and returning the arrest reports to the INS district offices within 60 days.

FBI Arrest Reports. Procedures for submitting fingerprint cards to the FBI and returning the arrest reports to the alien files varied between district offices. INS asylum offices, which work independently from the district offices, have their own procedures.

An applicant obtains an application package (including the blank fingerprint card) from a district office. The application contains instructions on how and where to be fingerprinted, as described earlier. INS Information Officers hand out the applications and assist with questions.

After the application and fingerprint card are completed, the alien returns them in person or mails them to the district office, depending on the type of application. An application for permanent residency must be brought in and reviewed by an Information Officer because the application package contains numerous documents. Applications for naturalization are mailed to the appropriate district office. Applications for asylum are mailed to INS service centers, where they are assigned an alien number and forwarded to the appropriate asylum office.

In the district offices, applicants for naturalization or permanent residency are scheduled for interviews. Generally, the interviews are scheduled at least 60 days after the application is submitted to provide enough time for completion of the fingerprint check and receipt of reports of any identified arrest records. Application clerks remove the fingerprint cards from each of the application packages and mail them to the FBI. In the asylum offices, the fingerprint card is not sent to the FBI until after the scheduled interview and only if it appears that the application for asylum will be granted.

- Filing arrest reports received no priority over other material. We found several boxes of mixed material in the Records Section. This material included old arrest reports from 1992 and earlier which were never filed.

- Arrest reports in the Citizenship Branch (Naturalization) were not placed directly in the alien file after they were received from the Records Section. The arrest reports were filed by alien number in a central holding file. INS Examiners searched the holding file for arrest reports prior to the scheduled interview. The Examiners told us during interviews they rarely found arrest reports in the holding file. We noted most of the arrest reports in the holding file were from old fingerprint checks completed in 1992.

RECOMMENDATION

The Inspections Division recommends that the Commissioner, Immigration and Naturalization Service:

2. Instruct District Directors to ensure fingerprint cards are mailed promptly, and arrest reports which are received, are placed in the alien files before final adjudication.

RESUBMISSION OF UNCLASSIFIABLE FINGERPRINTS

In FY 1993, 91,827 fingerprint cards, or 11 percent of the total INS submissions, were rejected by the FBI as unclassifiable. Most of the applications associated with these fingerprint cards were subsequently adjudicated on the basis of an FBI name check only; a fingerprint check was not conducted. The FBI allows INS to submit a new set of fingerprints at no additional cost. However, we found in most cases new fingerprints were not submitted. At two district offices, we found the unclassifiable fingerprint cards returned by the FBI were destroyed.

Fingerprints which are smudged or illegible cannot be classified by FBI technicians in preparation for an automated search of the fingerprint data base. If the fingerprints are unclassifiable, the FBI will still conduct a name search of their records, but there is no search using the fingerprint classification. A name search may not detect the criminal record of an applicant who used a different name at the time of his or her arrest. If there is no ident through the name check the cards are stamped "Unclassifiable - No Record By Name" and returned to the INS office which initiated the check.

The FBI charges INS the $17 user fee even if the prints are unclassifiable, but the FBI does permit INS to submit a second sending them to the FBI. This type of training could aid in detecting cards which are obviously unclassifiable before they are sent to the FBI.

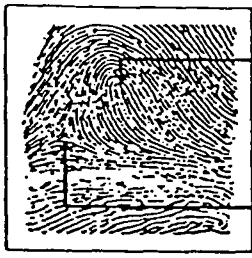
Improvements in the quality of the fingerprints submitted by the applicants will require greater controls over the organizations or individuals providing the service. This issue provides further justification for the district offices to make greater use of the VOLAGs or to contract for fingerprinting services. It would be easier for INS officials to direct an applicant to obtain a second set of fingerprints if there was a VOLAG providing services in the district office. It would also provide INS with greater oversight of the services provided.

FORM FD-258

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20537

APPLICANT

1. LOOP

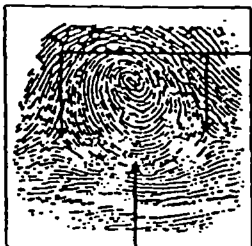


CENTER OF LOOP

DELTA

THE LINES BETWEEN CENTER OF LOOP AND DELTA MUST SHOW

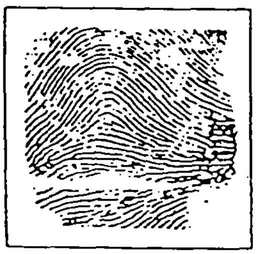
2. WHORL



DELTAS

THESE LINES RUNNING BETWEEN DELTAS MUST BE CLEAR

3. ARCH



ARCHES HAVE NO DELTAS

FD-258 (REV. 12-29-82)

TO OBTAIN CLASSIFIABLE FINGERPRINTS:

1. USE BLACK PRINTER'S INK.
2. DISTRIBUTE INK EVENLY ON INKING SLAB.
3. WASH AND DRY FINGERS THOROUGHLY.
4. ROLL FINGERS FROM NAIL TO NAIL, AND AVOID ALLOWING FINGERS TO SLIP.
5. BE SURE IMPRESSIONS ARE RECORDED IN CORRECT ORDER.
6. IF AN AMPUTATION OR DEFORMITY MAKES IT IMPOSSIBLE TO PRINT A FINGER, MAKE A NOTATION TO THAT EFFECT IN THE INDIVIDUAL FINGER BLOCK.
7. IF SOME PHYSICAL CONDITION MAKES IT IMPOSSIBLE TO OBTAIN PERFECT IMPRESSIONS, SUBMIT THE BEST THAT CAN BE OBTAINED WITH A MEMO STAPLED TO THE CARD EXPLAINING THE CIRCUMSTANCES.
8. EXAMINE THE COMPLETED PRINTS TO SEE IF THEY CAN BE CLASSIFIED, BEARING IN MIND THAT MOST FINGERPRINTS FALL INTO THE PATTERNS SHOWN ON THIS CARD (OTHER PATTERNS OCCUR INFREQUENTLY AND ARE NOT SHOWN HERE).

THIS CARD FOR USE BY:

LEAVE THIS SPACE BLANK

1. LAW ENFORCEMENT AGENCIES IN FINGERPRINTING APPLICANTS FOR LAW ENFORCEMENT POSITIONS.*
2. OFFICIALS OF STATE AND LOCAL GOVERNMENTS FOR PURPOSES OF EMPLOYMENT, LICENSING, AND PERMITS, AS AUTHORIZED BY STATE STATUTES AND APPROVED BY THE ATTORNEY GENERAL OF THE UNITED STATES. LOCAL AND COUNTY ORDINANCES, UNLESS SPECIFICALLY BASED ON APPLICABLE STATE STATUTES DO NOT SATISFY THIS REQUIREMENT.*
3. U.S. GOVERNMENT AGENCIES AND OTHER ENTITIES REQUIRED BY FEDERAL LAW.**
4. OFFICIALS OF FEDERALLY CHARTERED OR INSURED BANKING INSTITUTIONS TO PROMOTE OR MAINTAIN THE SECURITY OF THOSE INSTITUTIONS.

INSTRUCTIONS:

*1. PRINTS MUST FIRST BE CHECKED THROUGH THE APPROPRIATE STATE IDENTIFICATION BUREAU, AND ONLY THOSE FINGERPRINTS FOR WHICH NO DISQUALIFYING RECORD HAS BEEN FOUND LOCALLY SHOULD BE SUBMITTED FOR FBI SEARCH

2. PRIVACY ACT OF 1974 (P.L. 93-579) REQUIRES THAT FEDERAL, STATE, OR LOCAL AGENCIES INFORM INDIVIDUALS WHOSE SOCIAL SECURITY NUMBER IS REQUESTED WHETHER SUCH DISCLOSURE IS MANDATORY OR VOLUNTARY, BASIS OF AUTHORITY FOR SUCH SOLICITATION AND USES WHICH WILL BE MADE OF IT

**3. IDENTITY OF PRIVATE CONTRACTORS SHOULD BE SHOWN IN SPACE "EMPLOYER AND ADDRESS". THE CONTRIBUTOR IS THE NAME OF THE AGENCY SUBMITTING THE FINGERPRINT CARD TO THE FBI

4. FBI NUMBER, IF KNOWN, SHOULD ALWAYS BE FURNISHED IN THE APPROPRIATE SPACE

MISCELLANEOUS NO. - RECORD: OTHER ARMED FORCES NO., PASSPORT NO. (PP), ALIEN REGISTRATION NO. (AR), PORT SECURITY CARD NO. (PS), SELECTIVE SERVICE NO. (SS), VETERANS' ADMINISTRATION CLAIM NO. (VA).

☆U.S.G.P.O. 1990 262-201/20000

Subject	Date
DRAFT INSPECTION REPORT: Alien Fingerprint Requirements in the Immigration and Naturalization Service	FEB - 1 1994

To: Doris Meissner
Commissioner

From: Office of Operations

On review, we believe the findings of this inspection reflect an ongoing conflict between a changing, expanding workload and the inherent difficulties of resource allocation. While fingerprinting provides an invaluable source of information to the adjudicative process, it is resource intensive and time consuming. The Service will continue to seek the appropriate balance between resources and need which will provide the information necessary for proper adjudication of applications for benefits under the Immigration and Nationality Act.

> **FINDING: We found fingerprint checks are necessary to detect criminal records which may make an applicant ineligible for benefits. However, changes to the current policy of conducting checks for all aliens applying for naturalization, permanent residency, and other benefits may be in order.**

INS RESPONSE: CONCUR IN PART

Fingerprint checks provide a significant source of factual information into an applicant's background. However, the initial adjudication process requires only *prima facie* knowledge of unlawful activity. This may be obtained through many supplemental or alternative sources. Once an applicant is distinguished by this information, the adjudicator has alternative and frequently superior sources of information not generally available in enforcement procedures including the applicant him or herself.

The procedures presently used by Adjudications were established before the development of modern data processing and are excessively labor intensive. Any changes in procedures must provide for integration into the changing technologies within the Service, including both benefit and enforcement programs, and outside agencies such as the FBI. The Service is reviewing options and incorporating new procedures into its developing automated data processing systems.

OFFICE OF THE INSPECTOR GENERAL'S ANALYSIS OF MANAGEMENT'S RESPONSE

In response to the draft report, INS stated fingerprinting procedures were labor intensive. They further indicated they will seek the appropriate balance between resources and need which will provide the information necessary for proper adjudication of applications. The Office of the Inspector General (OIG) agrees fingerprint checks are labor intensive; however, the OIG continues to believe fingerprint checks are a necessary step in the adjudication process to determine eligibility for benefits.

Recommendation Numbers:

1. **Resolved-Open**. This recommendation is resolved pending our receipt and review of the new INS policy regarding control of fingerprints, which INS anticipates will be formulated no later than March 15, 1994.

2. **Resolved-Open**. The OIG agrees with the corrective action to be initiated. Please provide a copy of the instructions to be sent to the district offices and service centers by April 1, 1994. The recommendation will remain open pending our receipt and review of these instructions.

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Divider Title: 57

NOGALES FLOOD TUNNEL

ISSUE STATEMENT: What is the Administration's role in securing the Nogales, Arizona flood tunnel?

BACKGROUND: A flood tunnel runs between Mexico and Nogales, Arizona, that has one end opening into downtown Nogales. Mexican youth have been illegally entering Nogales through the tunnel and committing crimes in the city. City officials, Congressman Pastor, and Senator McCain requested that INS take "responsibility" for erecting a barrier in the tunnel to deter the illegal entries. INS initially declined to acknowledge responsibility for resolving the issue. As a result, the Department advised the city, congressional parties, and INS that the Department would coordinate the resolution of the issue, even if that did not result in the Federal Government taking responsibility for the solution. On May 3, the Attorney General asked INS to provide the Department with a recommended resolution of the issue.

STATUS: The Department is awaiting the INS recommendation on resolution of the tunnel issue. Meanwhile, city officials signed a memorandum of understanding with the Defense Department, agreeing that if DOD built barriers in the tunnel, the City would indemnify it against any claims in connection with the barriers. However, the City and congressional parties are still looking to the Federal government to play a role in resolving this issue. In particular, the city would like INS to "co-indemnify" DOD with the city. At this point, INS only has agreed to provide materials for construction of the barrier and security during construction.

DEPARTMENT POSITION: The Department believes that INS has a role in resolving this issue, as it involves the illegal entry of Mexican youths into the United States. The Department wants INS to cooperate with the city in finding the appropriate solution to the issue.

JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS: Senators Ted Kennedy, Paul Simon, Dianne Feinstein, and Alan Simpson all are very interested in immigration issues, so might be aware of this issue from a precedent-setting point of view. However, only Senator DeConcini, who is from Arizona, specifically has shown interest in resolving the issue.

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Divider Title: **58**

GAY ISSUES -- GAY GAMES AND TOBOSO DECISION

ISSUE STATEMENT: On March 22, 1994, the Attorney General authorized the admission of HIV-positive foreigners to the United States for up to ten days to attend the Gay Games IV in New York City in June. This generated some controversy among legislators who recently voted to amend the Immigration and Nationality Act to expressly define HIV as a communicable disease of public health significance, hence making its carriers excludable from the United States. In another significant action, the INS recently requested that the Board of Immigration Appeals (BIA) publish as precedent its 1990 Toboso decision, which found that homosexuals in Cuba were a "particular social group" subject to persecution, and therefore eligible for refugee status under U.S. asylum law.

BACKGROUND: The Attorney General approved the ten-day Gay Games waiver after the Center for Disease Control and Prevention advised her there was no public health reason to prohibit the brief stay in the United States. The Department of Health and Human Services also stated that exclusion of foreign competitors and spectators would be inconsistent with the policy of combatting discrimination against individuals who have the HIV infection. The Gay Games take place over eight days, and two more days have been allotted for travel.

In Matter of Toboso, the BIA recognized a homosexual's claim for withholding of deportation based on membership in a particular social group and upon facts clearly demonstrating the Cuban government's persecution of homosexuals. In so far as this case has not been designated as a precedent decision, it cannot be cited as authority in other cases, several of which are currently pending before the BIA. Precedent decisions by the Board are binding on all officers and employees of the INS and immigration judges involving the same issue or issues.

From time to time, the INS has requested that the BIA designate a case as a precedent decision. Such a request is typically made by parties to the litigation soon after the case is decided. In this case four years has lapsed since the issuance of the Toboso decision, and therefore the request is unusual. However, INS Commissioner Meissner's request is consistent with the INS's more recent policy which acknowledges that homosexuals who provide sufficient evidence of government sponsored or condoned persecution are eligible for asylum based on membership in a particular social group. This was demonstrated in a recent case in which the INS Asylum Office granted asylum to a Mexican homosexual, based on the narrow facts of his case. It is important to resolve this sensitive issue of asylum law.

A request to establish a case as precedent is not binding on the BIA. It will be put to a vote by the Board members. If the Board votes to deny Commissioner Meissner's request, the Attorney General retains the option under the regulations of certifying the case and establishing it as precedent.

To the extent this request is made public, response on the Hill will be mixed. Congressman Barney Frank, (D-MA) who has requested that this action be taken, will respond favorably and is likely to report it to his constituents and those Congressional representatives supportive of gay issues. It is likely to draw criticism from conservative factions on the Hill including Congressman Lamar Smith, (R-TX), member of the House Judiciary Immigration Subcommittee who has been outspoken on this issue and accused the administration of having a "pro-homosexual" agenda through its immigration policy.

DOJ POSITION: The Attorney General feels strongly that people with HIV and AIDS should be treated with dignity and respect, and she supports our public health policies of encouraging participation by individuals with disabilities in our society, of acknowledging their achievements, and of avoiding the stigmatization of persons with a particular disease. The Attorney General also supports the publication of the Toboso case as precedent.

REFERENCE MATERIAL: AIDS/HIV Screening and Waiver Procedure (attached)

AIDS/HIV SCREENING AND WAIVER PROCEDURES

Legal Basis for Excludability and Waiver Provisions

- An alien who has AIDS, or who tests positive for the HIV virus, is excludable from the United States as a person having a communicable disease of public health significance. (Sec. 212(a)(1)(a)). However, a waiver of excludability may be granted, provided that certain conditions are met. (Sec. 212(g); 212(d)(3)). For intending permanent residents, who are either applying from overseas or who are adjusting status within the United States, a waiver may be granted where the alien has certain family ties to the United States, such as a spouse, parents or children. (Sec. 212(g)). Regulations further require that the danger to public health will be minimal, the possibility of the spread of the disease will be minimal, and that no cost will be incurred by any government agency without that agency's prior consent. (8 C.F.R. 245a.3(d)). Persons who are seeking temporary admission to the U.S. (non-immigrants) may also apply for a waiver under similar conditions, except that family ties are not required. (Sec. 212(d)(3)). The three conditions on minimal public health danger and the burden on other agencies are a matter of INS policy in the case of non-immigrant waivers.

Procedures

- Individuals who are seeking to come into the U.S. as permanent residents must be tested for AIDS/HIV before they are granted visas. Testing is also required for individuals seeking to adjust to permanent resident status in the U.S. (Sec. 245). Approximately 200 individuals seeking to adjust status have tested positive. Refugees are also generally pre-screened by doctors overseas prior to their arrival. If the refugee has not been screened prior to arrival for any reason, he/she is tested at the time of application to adjust to permanent resident status. (Sec. 209). INS is unaware of any refugees who have tested positive at this stage. Applicants for asylum are not tested as part of the initial application process. However, asylees are tested when they seek to adjust to permanent resident status. (Sec. 209). Applicants for legalization under the Immigration Reform and Control Act of 1986 were also required to be tested.

- Waivers are granted to those individuals who test positive for HIV and who also meet the conditions described above for immigrants and non-immigrants. Refugees and asylees who seek to adjust status may also be granted a waiver for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. (Sec. 209(c)(3)).

- All non-citizens who enter at U.S. ports of entry are inspected by immigration officials. If any person shows outward signs of AIDS/HIV infection, he/she will be tested for the virus. INS is unaware of any individuals screened in this manner at the ports of entry who have tested positive.

- All excludable aliens placed in detention are examined by a physician. If they exhibit outward signs of AIDS, testing is ordered. If an individual tests positive, the rules governing waivers for non-immigrants are applied during the determination on whether to parole the person into the U.S..

Precedent Experience with Haitians In Guantanamo

- When Haitians were interdicted on the high seas and brought to the U.S. military base at Guantanamo, individuals who were screened in were tested for HIV infection. Those who tested positive were generally held in detention in Guantanamo, although some persons were permitted to enter the U.S. under the waiver rules.

- Eventually, all eligible asylees who tested positive were allowed to enter the U.S., pursuant to a New York federal district court's ruling.

Options

Options as to HIV testing include: 1) following usual inspections and detention policy of screening people only with outward physicial signs of AIDS; 2) not screening anyone at all; 3) conducting full medical screening of the boat population - via a medical examination for exclusion.

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Divider Title: **59**

HAITI MIGRATION POLICY

ISSUE STATEMENT: On May 8, the Administration announced a modification of its refugee-screening policy with respect to Haitian migration. The Coast Guard will continue to interdict Haitian migrants at sea, but refugee processing will now be provided either in third countries or on board ships. Those migrants who are determined to be genuine refugees will be provided refuge, either in third countries or in the United States, while others will be returned to Haiti. These new refugee processing procedures will begin once the necessary logistical arrangements have been made. Until then, all interdicted migrants will be returned to Haiti.

BACKGROUND: Following the overthrow of the democratically-elected government of Jean Bertrand Aristide in 1991, several thousand Haitians attempted to enter the United States by sea, with hundreds losing their lives in the process. In order to discourage Haitian migrants from undertaking this risk, the U.S. Government instituted a policy of repatriating Haitian migrants interdicted by the Coast Guard, and providing refugee interviews at the U.S. consulate in Haiti. This policy was changed by President Clinton on April 22, following reports of human rights abuses by the military government.

STATUS: As of May 24, arrangements for a refugee screening center or centers were still being made, and interdicted Haitians were being returned to Haiti. The Associate Attorney General's Office and INS are very closely involved in this planning process for refugee centers. The United Nations High Commissioner for Refugees (UNHCR) announced on May 20 that it will assist in this effort by counseling Haitians, making training available for U.S. officials involved in refugee determinations, and seeking third country cooperation in placement of bona fide refugees.

Prior to the change in processing policy, a freighter with 411 Haitians on board was escorted by the Coast Guard into South Florida on April 22. This entry was permitted because the boat was close to shore, and there was evidence of abuse of the passengers by the crew. Nine of the crew members from that boat are being detained for possible criminal charges of alien smuggling. This entry was an exceptional circumstance, and does not reflect a shift in the Administration's policy of protecting U.S. borders from undocumented aliens. Most of the remainder of the 411 Haitians on board the April 22 boat have been paroled into the community. About 60% were paroled in Florida and 40% in other states.

DOJ POSITION: Supports measures which provide relief to bona-fide Haitian refugees, while continuing to protect U.S. borders from undocumented economic migrants.

JUDICIARY COMMITTEE INTEREST: Sens. Kennedy and Simpson staffs have been briefed on the new policy. Sens. Simon and Mosely-Braun may also have an interest.

REFERENCES: 1) White House press release on Haiti policy review; 2) NSC press guidance on delays in implementing new policy; 3) Policy questions and answers.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release May 8, 1994

HAITI

Summary

At the conclusion of a comprehensive review of United States policy toward Haiti, the President announced on May 8 several new steps to bring about the restoration of democracy and return of Haiti's democratically-elected President Jean-Bertrand Aristide while addressing humanitarian concerns which worsening repression in Haiti has intensified.

The major new steps the President announced were:

-- The appointment of William Gray, the distinguished President of the United Negro College Fund and former Chairman of the House Budget Committee, as the new Special Adviser to the President and Secretary of State on Haiti to focus and invigorate our diplomacy.

-- Changes in our procedures for returning boat migrants to Haiti to ensure that all who claim refugee status are given a hearing while still discouraging massive and dangerous departures by sea.

-- New emphasis on using comprehensive sanctions and improved sanctions enforcement to make Haiti's military leaders relinquish power. The UN Security Council approved May 6 a new resolution intensifying the sanctions.)

-- Augmentation of humanitarian assistance for Haiti's poor and support for the earliest arrival in Haiti of more UN and OAS human rights monitors.

-- Intensified consultations at the United Nations on preparing the UN military and police mission for deployment to Haiti once the military leaders have relinquished power.

Background

Resolving the crisis in Haiti has been a continuing policy priority of the President and this Administration. Our objective has been to restore democracy and to make possible the return to Haiti of President Aristide. The urgency of the situation has grown as the intransigence and depredations of Haiti's military leaders have worsened.

The President is working to advance the several U.S. national interests at stake:

-- DEMOCRACY: Haiti is one of only two countries in this hemisphere where the people are deprived of their right to democracy. Democracy underpins our efforts to build freedom and prosperity in this hemisphere through such initiatives as NAFTA and the December Summit of the Americas in Miami.

-- HUMAN RIGHTS AND HUMANITARIAN CONCERNS: The Haitian people are suffering worsening privation and brutality at the hands of the military. Unless soon halted these abuses could drive large numbers of Haitians to risk the perils of the sea to try to reach our shores. The first step in giving Haitians hope in their own land is for the military leaders to leave and democracy to be restored. This will allow the international community to work with Haiti to address the root causes of migration.

-- PROTECTION OF AMERICANS OVERSEAS: As many as 10,000 Americans live and work in Haiti. Their safety is threatened by deepening military abuses and the insecurity that creates.

The President and his senior advisers have reviewed our policy toward Haiti during the last six weeks. This review was prompted by the rejection by the Haitian military leadership of every initiative to achieve a political settlement of the crisis and by their visibly worsening human rights abuses. As a result of this review the President has directed important changes in our policy to increase the pressure on Haiti's military leaders while addressing the humanitarian repercussions of their misrule.

VIGOROUS DIPLOMACY: The appointment of William Gray as the President's and Secretary of State's Special Adviser on Haiti will inject new vision and determination into our efforts. The President will rely on Mr. Gray as a central figure in our Haiti policy. As Mr. Gray leads that effort, Ambassador Albright will be working closely with the Secretary General and her colleagues to ensure that the UN brings all its resources to bear. Ambassador Babbitt will do likewise at the OAS, and Ambassador Swing will direct our efforts within Haiti in support of the new policy.

NEW MIGRANT PROCESSING PROCEDURES: In the context of our broader Haitian policy review we also reviewed our migration policy. We currently process Haitians for refugee claims only within Haiti, and we interdict and return all those who seek to migrate by boat without processing. Haitians who are returned by our interdiction effort are permitted to apply for refugee status within Haiti. Those who claim political persecution on questionnaires completed while they are being returned to Port-au-Prince are encouraged to apply at our in-country refugee center. Since the inception of in-country refugee processing in 1992 we have accorded refugee status to nearly 3,000 Haitians. We have increased the refugee intake from Haiti through in-country processing ten-fold compared to the last Administration.

The UN/OAS International Civilian Mission has documented a substantial increase in killings and other brutal abuses in recent months. During the month of April alone it noted nearly 50 executions and suspicious deaths, including 11 separate murders during April 23-24 alone. It has reliably reported significant increases in kidnappings and forced disappearances, rapes, attacks on children and other abuses. In Gonaives and other parts of Haiti, military sweeps have led to dozens of deaths. Under these circumstances, the President has concluded that it is inappropriate to return all Haitian boat migrants without first affording them the opportunity to make claims to refugee status and protection. While our in-country processing provides a crucial route to refuge for many Haitians, it may no longer be adequate.

Therefore, the President has modified our procedures for processing Haitian boat migrants. Our Coast Guard will continue to interdict all Haitian migrants at sea but we will no longer return them to Haiti without first interviewing them to determine which are *bona fide* political refugees. Processing will involve a standard refugee interview similar to that currently performed by our three refugee processing centers in Haiti. It will be carried out either in third countries or aboard appropriate ships. Those who qualify as political refugees will be resettled outside Haiti. Other countries will be approached to join us in accepting Haitian political refugees. Those not qualifying for refugee status will be returned promptly to Haiti.

<u>The new procedures will not come into effect until after our new processing facilities outside Haiti are in place.</u> That will be some weeks from now. Until that time, which will be announced publicly, we will continue to return all interdicted boat migrants to Haiti without processing. We will be unable to process boat migrants for possible refugee status adequately and fairly before then and we must discourage departures in unseaworthy vessels with the attendant risk of death at sea.

INTENSIFIED SANCTIONS: The UN Security Council on May 7 unanimously approved a strong resolution intensifying sanctions. The resolution immediately made effective worldwide the targeted entry ban and asset freeze which we have been enforcing since last year against the military and its allies. It also imposed an immediate ban on non-scheduled flights to and from Haiti. Within the next two weeks the world community will bring into force comprehensive trade sanctions against Haiti, excluding only the most essential humanitarian supplies.

On May 7, the President signed an Executive order and Proclamation implementing the first two of those measures. A second Executive order will bring the comprehensive trade sanctions into effect in the next several days.

FULL ENFORCEMENT OF SANCTIONS: Our naval vessels around Haiti will continue to stop ships entering and leaving Haitian waters and divert those carrying prohibited cargo. The President has been in contact with President Balaguer of the Dominican Republic to express his concern about sanctions leakage on their long border with Haiti and our willingness to assist the Dominicans in meeting their international obligation to enforce the sanctions. We are working with the United Nations to facilitate international cooperation with the Dominican Republic.

HUMANITARIAN/HUMAN RIGHTS MEASURES: Comprehensive new sanctions and strengthened enforcement will increase the pressure on the Haitian people. To shield the most vulnerable Haitians from the sanctions' worst impact, we will increase as soon as possible our humanitarian feeding and health care programs to reach 1.2 million beneficiaries. We are working to restore the full complement of 250 UN/OAS civilian human rights observers to Haiti.

RECONFIGURING THE UN MISSION IN HAITI: We will be consulting intensively with our partners in New York to prepare the planned UN military and police Mission for Haiti to be able to function effectively and safely once the military leadership has relinquished power. As those consultations proceed and the possibilities for our own participation in the Mission become clearer we will consult extensively with the Congress.

* * *

Julie/
FYI
Ann

NATIONAL SECURITY COUNCIL

18-May-1994 09:41 EDT

UNCLASSIFIED

MEMORANDUM FOR: SEE BELOW

FROM: Eric P. Schwartz (SCHWARTZ).

SUBJECT: HAITI MIGRATION: PRESS GUIDANCE

Haiti Migration

Qs and As

Q: The NY Times reports delays in implementing the new migration policy. Any comment?

A: -- The Times report is wrong.

-- It is far more accurate to say that we are making steady progress in achieving our goal of implementing a workable and credible system outside of Haiti for interviewing boat migrants.

-- The President clearly stated on May 8 that it would take "some weeks" to put a new system into effect. It has been less than two weeks so far. The Administration has had a high intensity, interagency effort underway to put a system in place in weeks that would normally take months to design and implement.

-- The President has been personally involved, meeting with UN High Commissioner for Refugees Mrs. Ogata and communicating personally with other leaders concerned.

Q: Why not implement the new system right away?

A: -- In humanitarian terms, it would be irresponsible for us to effect a change of policy before it was ready to be implemented. Such action could risk the lives of hundreds if not thousands of Haitians in an unmanaged migration. In this respect, it is worth noting that over the past 18 months, we have documented the deaths at sea of more than 300 Haitians.

Q: What takes so long?

A: -- The operational challenges are substantial. there are diplomatic, logistical, and personnel steps that need to be taken for a new system to work. Locations for Migrant Processing Centers must be found. The centers themselves must be located and equipped. Staff must be identified and trained. All of this is now underway on an expedited basis.

Q: Why did you announce the policy change before being ready to implement it?

A: -- It is simply not possible to develop fully implementation plans of this magnitude on a contingency basis. Hiring hundreds of contract employees, obtaining commitments from third countries, both to serve as processing sites and to provide resettlement or asylum, contracting ships and constructing facilities -- all these actions can only come after the policy decision has been made.

Q: When do you expect to have the new system operating?

A: -- As the President said, it would take some weeks. We cannot be more precise than that.

Q: Is it true that President Clinton asked Prime Minister Major about use of the Turks and Caicos for refugee processing and that this issue is under consideration?

A: -- The President and the Prime Minister did speak earlier this week, as they have on many occasions, and discussed a number of issues, including Haiti and options on the issue of refugee processing.

Q: But is the Prime Minister considering a U.S. request for UK willingness to permit the use of the Turks and Caicos for processing?

A: -- The President did discuss this issue among others with the Prime Minister, and we understand it is being considered by London and the Turks and Caicos Government.

Q: The Times reports that the U.S. has failed to convince any country to process Haitians or permit them asylum or resettlement in their countries. Is this true?

-- The implication that our discussions have been unsuccessful, or that we have been rebuffed by any country, is simply wrong.

-- In fact, we are engaged in very productive discussions with many countries on these issues and are hopeful of cooperation.

Q: But have any governments agreed to accept refugees or to serve as processing sites?

A: -- I'm not prepared to discuss the details of these discussions.

Q: The *Times* alleges that we use overly restrictive processing criteria in Port au Prince and thereby deny bonafide claimants the chance to make the case for refugee status.

A: -- In each of the countries where we conduct "in-country" processing, we use processing criteria.

-- It is worth noting that Haiti is one of only four countries around the world where people have the chance to make application for refugee status without fleeing. [FYI: The others are the former Soviet Union, Vietnam and Cuba.]

-- In Haiti, the criteria used is designed to enable us to most quickly identify those persons in greatest need of assistance and move their cases quickly.

[Refer to State for more details on the criteria we use within Haiti.]

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CC:	Ernest J. Wilson III	(WILSON)
CC:	Susan E. Rice	(RICE)
CC:	Marcia G. Norman	(NORMAN)
CC:	Sean J. Darragh	(DARRAGH)
CC:	Beverly J. Roundtree	(ROUNDTREE)

Haiti Policy Review

Q: Why did you change your policy of direct return of Haitian Migrants?

A: -- In recent months the human rights and humanitarian situation in Haiti has deteriorated markedly.

-- As we have worked to restore democracy and return President Aristide to Haiti, violence against the Haitian people by the military has increased.

-- Under these circumstances, I decided we should adjust our migrant processing procedures to insure that every person with a claim to refugee status could be safely screened in the greatest possible safety.

-- In-country processing will continue. In light of the situation in Haiti, I believe that processing interdicted boat migrants prior to returning them is the right thing to do.

Q: Is this change a result of Randall Robinson's hunger fast?

A: -- This change is a result of what is happening in Haiti. I admire Randall Robinson's commitment to solving the problems of Haiti and we share the goal of restoring democracy to Haiti.

-- My concern about this has been increasing over several weeks. I sent staff down to Haiti to look at the situation first hand. Their conclusion, as well as that of the INS, is that changes needed to be made.

Q: Aren't you admitting that your policy of direct return was wrong?

A: -- The circumstances in Haiti have changed over the past 14 months. As I've said, the violence has increased and the military has failed to live up to its obligations.

Q: Aren't you inviting a new wave of Haitian boats migrants?

A: -- No. We will continue to return all migrants not found to be legitimate political refugees. The only difference is that migrants interdicted at sea will be screened and bona fide political asylum-seekers will not be returned to Haiti. All others will be returned. There will be no advantage for any Haitian to take to the sea.

Q: How are you going to force the Haitian military to resign? Nobody believes that sanctions alone will solve the Haitian crisis.

Q: If it was not appropriate to change policy last year, then why is it appropriate now?

A: -- The modification we are announcing is necessary in view of the deteriorating human rights situation.

-- Our goals have always been to discourage unsafe boat departures while providing access to in-country procedures. These changes advance those objectives under these worsening conditions.

Q: Then how do you propose to deter departure in unseaworthy vessels?

A: -- First, the policy of interdiction of all boat migrants will continue. All those without valid refugee claims will be returned. We will work hard to publicize that message in Haiti through all available media avenues.

-- Second, no Haitians will be permitted U.S. entry prior to a determination that they are bona fide refugees. We will seek to do processing either in third countries or on ships adequate to the task.

-- Third, the Coast Guard and Navy will deploy adequate resources to deal effectively with boat departures.

-- Fourth, we will not implement this modification of policy until all the arrangements are in place.

Q: Will you continue your in-country processing program?

A: -- Yes, as this has proven to be an extremely valuable vehicle for Haitians who need to flee.

-- As I mentioned, we have greatly enhanced the in-country processing system. It now is providing processing to 10 times the number of people than when I took office.

- o In addition to our processing center in Port-au-Prince, we've opened two additional processing centers in provincial cities in Haiti to expand access to the program.

- o We have also substantially increased staffing at the processing centers, as well as efforts to work with non-governmental organizations in identifying applicants who should be considered.

- o Moreover, we can and do expedite processing high priority cases to ensure they are brought quickly to the United States.

- o These efforts have paid off.

- o In the first year of my Administration, we admitted about 1700 refugees through our in-country program.

- o This represents a ten-fold increase from the last year of the previous Administration.

Q: What about the impact of entry of Haitians on Florida?

A: -- I am instructing the Departments of State, Justice and Health and Human Services to work with affected localities and to make efforts to ensure geographical distribution of the resettled population.

Q: Have you lined up third countries which will host processing or accept qualified refugees?

A: -- We will be consulting with governments throughout the region to seek their cooperation in offering refuge to qualified Haitians and for processing.

-- However, our new policy is not dependent upon third country participation.

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Divider Title: 60

DIFFERENCES IN TREATMENT OF CUBAN AND HAITIAN MIGRANTS

ISSUE STATEMENT: Undocumented Cuban migrants are usually permitted by the Coast Guard to enter the United States, while interdicted Haitians are normally either repatriated to Haiti, or, under the Administration's newly announced policy, will be brought to safe havens for refugee screening. The apparent discrepancy in treatment has generated criticism and even charges of racism.

BACKGROUND: Many factors account for the difference in treatment. First, the United States has no interdiction agreement with Cuba, as we do with Haiti. Consequently, interdicted Cuban migrants are not currently returned to Cuba. Second, Cuban law carries a statutory penalty of up to three years in prison for those who attempt to leave Cuba without permission. No similar law currently exists in Haiti. Third, the Cuban Adjustment Act of 1966 makes it possible for most Cubans who have been admitted and paroled into the United States to adjust to permanent resident status within one year. No such provision exists for Haitians.

STATUS: Our current repatriation agreement with Cuba is limited to the return of 2746 excludable criminal aliens who entered the United States as part of the Mariel Boatlift. There is no expectation of entering into a broader repatriation or interdiction agreement with Cuba in the near future. Therefore, the policy of allowing Cuban migrants to enter the United States is expected to continue.

DEPARTMENT'S POSITION: The treatment of Cuban and Haitian migrants is dictated by U.S. relations with Cuba and Haiti, foreign policy considerations, and by the favorable status of Cubans mandated by the Cuban Adjustment Act.

REFERENCES: Attached is copy of Cuban Adjustment Act of 1966, as amended, 8 U.S.C. § 1255, note.

CUBAN REFUGEES—STATUS

For Legislative History of Act, see p. 3792

PUBLIC LAW 89-732; 80 STAT. 1161

[H. R. 15183]

An Act to adjust the status of Cuban refugees to that of lawful permanent residents of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Notwithstanding the provisions of section 245(c) of the Immigration and Nationality Act, the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least two years, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence. Upon approval of such an application for adjustment of status, the Attorney General shall create a record of the alien's admission for permanent residence as of a date thirty months prior to the filing of such an application or the date of his last arrival into the United States, whichever date is later. The provisions of this Act shall be applicable to the spouse and child of any alien described in this subsection, regardless of their citizenship and place of birth, who are residing with such alien in the United States.

Sec. 2. In the case of any alien described in section 1 of this Act who, prior to the effective date thereof, has been lawfully admitted into the United States for permanent residence, the Attorney General shall, upon application, record his admission for permanent residence as of the date the alien originally arrived in the United States as a nonimmigrant or as a parolee, or a date thirty months prior to the date of enactment of this Act, whichever date is later.

Sec. 3. Section 13 of the Act entitled "An Act to amend the Immigration and Nationality Act, and for other purposes", approved October 3, 1965 (Public Law 89-236), is amended by adding at the end thereof the following new subsection:

"(c) Nothing contained in subsection (b) of this section shall be construed to affect the validity of any application for adjustment under section 245 filed with the Attorney General prior to December 1, 1965, which would have been valid on that date; but as to all such applications the statutes or parts of statutes repealed or amended by this Act are, unless otherwise specifically provided therein, continued in force and effect."

Sec. 4. Except as otherwise specifically provided in this Act, the definitions contained in section 101(a) and (b) of the Immigration and Nationality Act shall apply in the administration of this Act. Nothing contained in this Act shall be held to repeal, amend, alter, modify, affect, or restrict the powers, duties, functions, or authority of the Attorney General in the administration and enforcement of the Immigration and Nationality Act or any other law relating to immigration, nationality, or naturalization.

Approved November 2, 1966.

INTERGOVERNMENTAL RELATIONS COMMISSION

For Legislative History of Act, see p. 3802

PUBLIC LAW 89-733; 80 STAT. 1162

[H. R. 15335]

An Act to amend the Act entitled "An Act to establish an Advisory Commission on Intergovernmental Relations", approved September 24, 1959.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Paragraphs (6) and (7) of section 3(a) of the Act entitled "An Act to establish an Advisory Commission on Intergovernmental Relations", approved September 24, 1959 (73 Stat. 703; 5 U.S.C. 2373 (a)),[32] are amended to read as follows:

"(6) Four appointed by the President from a panel of at least eight mayors submitted jointly by the National League of Cities and the United States Conference of Mayors; and

"(7) Three appointed by the President from a panel of at least six elected county officers submitted by the National Association of Counties."

Sec. 2. Subsection (c) of section 3 of such Act (5 U.S.C. 2373 (c))[33] is amended to read as follows:

"(c) The term of office of each member of the Commission shall be two years; members shall be eligible for reappointment; and, except as provided in section 4(d), members shall serve until their successors are appointed."

Sec. 3. Subsection (c) of section 6 of such Act (5 U.S.C. 2376 (c))[34] is amended by striking out "staff director" and inserting in lieu thereof "executive director".

Sec. 4. Subsection (f) of section 6 of such Act (5 U.S.C. 2376 (f))[35] is amended to read as follows:

"(f) No individual employed in the service of the Commission shall be paid compensation for such employment at a rate in excess of the rate provided for grade 18 under the General Schedule of the Classification Act of 1949, as amended, except that the executive director of the Commission may be paid compensation at any rate not exceeding the rate prescribed for level V in the Federal Executive Salary Schedule of the Federal Executive Salary Act of 1964."

Sec. 5. Subsection (b) of section 7 of such Act (5 U.S.C. 2377 (b))[36] is amended to read as follows:

"(b) Unless prohibited by State or local law, members of the Commission, other than those to whom subsection (a) of this section is

32. 5 U.S.C.A. § 2373(a).
33. 5 U.S.C.A. § 2373(c).
34. 5 U.S.C.A. § 2376(c).
35. 5 U.S.C.A. § 2376(f).
36. 5 U.S.C.A. § 2377(b).

assess the impact on the Government of the Virgin Islands of providing health, education, housing, and other social services to individuals whose status is adjusted under section 2 of this Act (and to relatives of such individuals who enter the Virgin Islands as a result of such adjustment) and the need for assistance to the Government of the Virgin Islands to assist it in meeting the needs of these individuals and relatives. They shall, within one year after the date of the enactment of this Act [Sept. 30, 1982], report to the President and the Congress on the results of their assessment and on any recommendations for changes in legislation which may be appropriate."

Development of Eligibility Criteria for Admission of Refugees from Cambodia

Pub.L. 95-624, § 16, Nov. 9, 1978, 92 Stat. 3465, provided that: "The Attorney General, in consultation with the Congress, shall develop special eligibility criteria under the current United States parole program for Indochina Refugees which would enable a larger number of refugees from Cambodia to qualify for admission to the United States."

Indochina Refugees; Adjustment of Status

Pub.L. 95-145, Title I, §§ 101-107, Oct. 28, 1977, 91 Stat. 1223, as amended by Pub.L. 96-212, Title II, § 203(i), Mar. 17, 1980, 94 Stat. 108, provided:

"Sec. 101. That (a) the status of any alien described in subsection (b) of this section may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if—

"(1) the alien makes an application for such adjustment within six years after the date of enactment of this title [Oct. 28, 1977];

"(2) the alien is otherwise eligible to receive an immigrant visa and is otherwise admissible to the United States for permanent residence, except for the grounds for exclusion specified in paragraph (14), (15), (20), (21), (25), and (32) of section 212(a) of the Immigration and Nationality Act [section 1182(a) of this title]; and

"(3) the alien has been physically present in the United States for at least one year.

"(b) The benefits provided by subsection (a) shall apply to any alien who is a native or citizen of Vietnam, Laos, or Cambodia and who—

"(1) was paroled into the United States as a refugee from those countries under section 212(d)(5) of the Immigration and Nationality Act [section 1182(d)(2) of this title] subsequent to March 31, 1975, but prior to January 1, 1979; or

"(2) was inspected and admitted or paroled into the United States on or before March 31, 1975, and was physically present in the United States on March 31, 1975.

"Sec. 102. Upon approval of an application for adjustment of status under section 101 of this title, the Attorney General shall establish a record of the alien's admission for permanent residence as of March 31, 1975, or the date of the alien's arrival in the United States, whichever date is later.

"Sec. 103. Any alien determined to be eligible for lawful admission for permanent residence under this title who acquired that status under the provisions of the Immigration and Nationality Act [this chapter] prior to the date of enactment of this title [Oct. 28, 1977] may, upon application, have his admission for permanent residence recorded as of March 31, 1975, or the date of his arrival in the United States, whichever date is later.

"Sec. 104. When an alien has been granted the status of having been lawfully admitted to the United States for permanent residence pursuant to this title, his spouse and children, regardless of nationality, may also be granted such status by the Attorney General, in his discretion and under such regulations he may prescribe, if they meet the requirements specified in section 101(a) of this title. Upon approval of the application, the Attorney General shall create a record of the alien's admission for permanent residence as of the date of the record of admission of the alien through whom such spouse and children derive benefits under this section.

"Sec. 105. Any alien who ordered, assisted, or otherwise participated in the persecution of any person because of race, religion, or political opinion shall be ineligible for permanent residence under any provision of this title.

"Sec. 106. When an alien is granted the status of having been lawfully admitted for permanent residence pursuant to the provisions of this title the Secretary of State shall not be required to reduce the number of visas authorized to be issued under the Immigration and Nationality Act [this chapter], and the Attorney General shall not be required to charge the alien any fee.

"Sec. 107. Except as otherwise specifically provided in this title, the definitions contained in the Immigration and Nationality Act [this chapter] shall apply in the administration of this title. Nothing contained in this title shall be held to repeal, amend, alter, modify, effect, or restrict the powers, duties, functions, or authority of the Attorney General in the administration and enforcement of the Immigration and Nationality Act or any other law relating to immigration, nationality, and naturalization. The fact that an alien may be eligible to be granted the status of having been lawfully admitted for permanent residence under this title shall not preclude him from seeking such status under any other provision of law for which he may be eligible."

[Section 204(b)(1)(C) of Pub.L. 96-212 provided that the amendment by Pub.L. 96-212 is effective immediately before Apr. 1, 1980.]

Cuban Refugees; Adjustment of Status

Pub.L. 89-732, Nov. 2, 1966, 80 Stat. 1161, as amended by Pub.L. 94-571, § 8, Oct. 20, 1976, 90 Stat. 2706; Pub.L. 96-212, Title II, § 203(i), Mar. 17, 1980, 94 Stat. 108, provided that:

"That, notwithstanding the provisions of section 245(c) of the Immigration and Nationality Act [subsec. (c) of this section], the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under

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such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence. Upon approval of such an application for adjustment of status, the Attorney General shall create a record of the alien's admission for permanent residence as of a date thirty months prior to the filing of such an application or the date of his last arrival into the United States, whichever date is later. The provisions of this Act shall be applicable to the spouse and child of any alien described in this subsection, regardless of their citizenship and place of birth, who are residing with such alien in the United States.

[See main volume for text of §§ 2 to 4]

"Sec. 5. The approval of an application for adjustment of status to that of lawful permanent resident of the United States pursuant to the provisions of section 1 of this Act shall not require the Secretary of State to reduce the number of visas authorized to be issued in any class in the case of any alien who is physically present in the United States on or before the effective date of the Immigration and Nationality Act Amendments of 1976 [see Effective Date of 1976 Amendment note under section 1101 of this title]."

[Section 204(b)(1)(C) of Pub.L. 96–212 provided that the amendment by Pub.L. 96–212 is effective immediately before Apr. 1, 1980.]

Legislative History

For legislative history and purpose of Pub.L. 94–571, see 1976 U.S. Code Cong. and Adm. News, p. 6073. See, also, Pub.L. 97–116, 1981 U.S. Code Cong. and Adm. News, p. 2577; Pub.L. 99–603, 1986 U.S.Code Cong. and Adm. News, p. 5649; Pub.L. 99–639, see 1986 U.S.Code Cong. and Adm. News, p. 5978; Pub.L. 101–649, 1990 U.S.Code Cong. and Adm. News, p. 6710; Pub.L. 102–110, 1991 U.S. Code Cong. and Adm. News, p. 305.; Pub.L. 102–232, 1991 U.S. Code Cong. and Adm. News, p. 1362.

CODE OF FEDERAL REGULATIONS

Admission for permanent residence, adjustment of statute to, see 8 CFR 245.1 et seq.

Classification of alien as immediate relative of citizen or as preference immigrant, see 8 CFR 204.1 et seq.

Deportation proceedings, see 8 CFR 237.1 et seq., 243.1 et seq.

Exclusion proceedings, see 8 CFR 236.1 et seq.

Powers and duties of officers of Immigration and Naturalization Service, see 8 CFR 103.1 et seq.

Requirements for admission, etc., of nonimmigrant classes, see 8 CFR 214.1 et seq.

Rescission of status adjustment, see 8 CFR 246.1 et seq.

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Immigration marriage fraud amendments of 1986: Till Congress do us part. Comment, 41 U.Miami L.Rev. 1087 (1987).

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Seeking asylum in the U.S. Carl Shusterman and Michael Straus, 14 L.A.Law. 34 (March 1991).

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Whatever happened to the Fourth Amendment?: Undocumented immigrants' grants after *INS v. Lopez-Mendoza* and *United States v. Verdugo-Urquidez*. Victor C. Romero, 65 S.Cal. L.Rev. 999 (1992).

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NOTES OF DECISIONS

½. Constitutionality

To same effect as second paragraph in pocket part, see Almario v. Attorney General, C.A.6 (Mich.) 1989, 872 F.2d 147.

This section denying discretionary relief of adjustment of status to non quota natives of western hemisphere countries has rational basis and is constitutional. Dunn v. Immigration and Naturalization Service, C.A.9, 1974, 499 F.2d 856,

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Divider Title: **61**

IMMIGRATION REIMBURSEMENT LAW SUITS BY STATES

ISSUE STATEMENT

* Three states, Florida, California, and Arizona, have recently filed separate civil actions in federal courts in their respective states involving the obligations of the United States to reimburse states for costs associated with illegal immigration.

* The California and Arizona suits are limited to the treatment of illegal aliens convicted of state crimes. Both states allege that it is the statutory responsibility of the Attorney General to reimburse them for the costs of incarcerating illegal aliens under 8 U.S.C. § 1365. In addition, California alleges that the INS does not promptly commence deportation proceedings against alien convicts or take custody of aliens who commit aggravated felonies after the completion of their sentences if they are suffering from a serious medical condition. California also alleges that insufficient attention is paid to prosecuting persons who repeatedly enter the country illegally and that the INS should be forced to conduct interior repatriation, not just border repatriation. State of California, et al. v. United States, et al., (S.D.Cal.); State of Arizona, et al. v. United States, et al., (D. Ariz.)

* Florida's complaint, by contrast, is a broader challenge which alleges generally that the United States has failed to control illegal migration, that Florida is required to provide social services to illegal immigrants, and that the United States should be required to reimburse it for these costs. The specific counts allege that disbursements should be made from the Immigration Emergency Fund, that restrictions on the use of Medicaid and AFDC for illegal aliens are unconstitutional, and that the Tenth Amendment and the Guarantee and Invasion Clauses of the constitution are violated by the United States' failure to exclude illegal aliens from the state. Chiles, et al. v. United States, (S.D. Fla.)

STATUS

Defendants' have not yet responded to the complaints in any of the cases. The response in Chiles is expected to be filed at the beginning of June. Responses in the remaining cases are due later that month.

DEPARTMENT'S POSITION

The Department anticipates filing dispositive motions in all three cases which challenge the justiciability of the specific claims as well as their legal sufficiency on the merits.

JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

Senator Feinstein has written the Attorney General on this general issue and can be expected to be interested in the California suit. The Florida lawsuit has also generated a great deal of political and public interest.

REFERENCE MATERIALS

Attached are a two page fact sheet on illegal immigration and talking points regarding the Florida and California lawsuits.

THE WHITE HOUSE

WASHINGTON

IMMIGRATION FACTS

May 18, 1994

OVERVIEW

The Clinton administration inherited a border control program that was understaffed and poorly equipped. The Border Patrol did not have the tools and technology--such as sensors, lighting, vans, and secure radios--to effectively prevent illegal crossings. In addition, no federal funds were allocated to help state and local governments offset the costs of illegal immigration.

Since the beginning of his administration, President Clinton has recognized the challenges presented by illegal immigration and taken aggressive steps to address them. While many of the President's proposals require Congressional approval, some progress has already been made and good faith efforts are underway on a variety of fronts to repair the damage of the past.

In a significant departure from prior administrations, President Clinton appointed a respected, knowledgeable immigration professional to head the Immigration and Naturalization Service. New Commissioner Doris Meissner served as a high-level INS executive in both Democratic and Republican administrations, and spent the past decade researching and writing about immigration issues. She has begun to make major changes in the way INS is managed, and has helped craft many of the new initiatives described below.

Finally, the President recognizes the significant contributions that immigrants have made to this country throughout our history. In that spirit, the administration has supported naturalization programs to help legal immigrants become fully participating members of our society.

ENFORCEMENT

* The President's FY 95 budget provides $368 million in new funding to address these problems. This initiative will result in over 1000 new Border Patrol officers deployed on the border, including a 40% increase in the San Diego area. It also provides new vehicles and communications equipment, plus additional fencing and lights along the border.

* $38 million in new funding is provided to enhance enforcement of federal laws prohibiting employers from knowingly hiring illegal immigrants.

* Long before Governor Wilson filed his lawsuit against the federal government seeking more rapid deportation of criminal aliens, the INS created the Institutional Hearing Program, which deports inmates from state and local prisons. Through that and other

programs, INS will deport more than 10,000 criminal aliens from California in the current fiscal year. In addition, the President's budget provides $55 million to double INS's capacity to deport criminal aliens and electronically link state and federal law enforcement agencies' criminal alien data bases.

FUNDING

* According to both the INS and the Census Bureau, the most recent estimate of the illegal immigrant population in California is about 1.6 million. In his budget, Governor Wilson suggests the number is at least 2.1 million. He then uses this higher figure as the basis for his estimated budget impact of illegal immigration. Therefore, his $2.3 billion estimate for the state costs of illegal immigration is inflated by almost 25% right off the top. This 2 million figure is also used in his recent television advertisement.

* President Clinton has proposed far greater reimbursement of state and local costs associated with immigration than any prior administration. He has fully funded the legal immigration assistance program (SLIAG) and refugee assistance programs, changed formulas to benefit states with illegal immigrant populations, and proposed hundreds of millions of dollars in unprecedented federal reimbursements for the costs of illegal immigration.

* Last year, the President requested $400 million to help states with health care costs of illegal immigrants. The Congress deleted this appropriation.

* The Medicaid formula that reimburses states for costs associated with treating indigent patients treated at public health facilities was altered to favor states that serve large populations of indigent patients. California has received almost $600 million in additional funds the past two years as a result of this change.

* In this year's budget, the President proposed a $700 million increase in Title I funding to reimburse states which serve "disadvantaged" students in their public schools, and altered the formula to help states with larger populations of disadvantaged students. These two changes, if approved by Congress, would result in over $100 million in additional funds for California.

* Last month, the President proposed spending $350 million to offset state costs associated with incarceration of illegal immigrants. No prior administration ever requested funds for this purpose before, even though Congress authorized this program in 1986. California would likely receive roughly half of these funds.

* Earlier this year, the President initiated a dialogue with seven immigration-impacted states to ascertain the true net state costs of providing services to illegal immigrants. OMB has engaged the Urban Institute to evaluate the methodologies used by the states to estimate these costs, and their work will be finished this summer. When the process is complete, the administration has pledged to work with the Congressional delegations of the seven states on educating the Congress on the legitimate needs of these states.

* Finally, $30 million is included in the President's budget for naturalization programs.

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IMMIGRATION TALKING POINTS: POLICY VS. POLITICS

* According to both the INS and the Census Bureau, the most recent estimate of the illegal immigrant population in California is about 1.6 million. In his budget, Governor Wilson suggests the number is at least 2.1 million. He then uses this higher figure as the basis for his estimated budget impact of illegal immigration. Therefore, his $2.3 billion estimate for the state costs of illegal immigration is inflated by almost 25% right off the top. This 2 million figure is also used in his recent television advertisement.

* Wilson's estimate of the per capita cost of illegal immigration is three times larger than estimates provided by Texas Governor Ann Richards, in part because he gives no credit for state and local taxes paid by illegal immigrants. Any fair accounting for the costs of illegal immigration would include taxes paid as an offset to services provided.

* Wilson announced earlier this month that he was "tripling" the National Guard presence at the border, then used this "fact" in his new television advertisement. Two thirds of the cost of this initiative is paid by the federal government under a program which permits the personnel to intervene in border matters only for drug interdiction, not illegal immigration. Using the Governor's own figures, only 42 National Guard personnel will be involved in immigration-related activities.

* Every legal expert cited in California news reports agrees that Governor Wilson's lawsuit against the federal government for immigration funding has virtually no chance of prevailing, yet the lawsuit is also trumpeted in his new television advertisement.

* While George Bush was President, Governor Wilson never requested reimbursement for the state costs associated with illegal immigration. He never complained when the Bush administration failed to fully fund the SLIAG legal immigration program. Since Bill Clinton was elected President, Wilson has relentlessly demanded more and more money for illegal immigration from the federal government to help reduce his multi-billion budget deficit.

TALKING POINTS FLORIDA LAWSUIT

Brief Summary

Governor Chiles, the State of Florida, and various State agencies have sued the United States, the Attorney General and various INS official, and the Secretary of HHS, all in their official capacities. Florida seeks a declaratory judgment that the Federal government has failed to comply with constitutional and statutory obligations owed to Florida in relation to the enforcement of the immigration laws pertaining to undocumented aliens and in respect to Medicaid and AFDC expenditures on behalf of aliens.

The complaint terms the alleged failure to enforce the immigration laws as the **"Federal Abdication and Default Policy."** Florida further seeks injunctive relief directing the Federal government either to cease the policies causing the alleged breach of a duty to protect Florida from illegal immigration or to provide various measures of restitution for the current and future financial costs to Florida resulting from the alleged Federal Abdication and Default Policy.

- The law suit has just been filed and is under review;

- The Administration through OMB and various departments including Justice, HHS and Education is working with the states heavily impacted by immigration, including Florida, to assess the magnitude of the illegal immigration problem and associated costs to the states in terms of Medicaid, criminal aliens, welfare and education;

- The Federal/State dialogue on these issues is vastly improved. We believe there is considerable room for cooperative efforts in these areas as evidenced by the recent Memorandum of Understanding signed by the INS and the State of Florida to expedite the deportation of 500 non-violent criminal aliens now held in state prisons;

- We are already in a very cooperative mode working with the states in studying these issues which have been neglected by previous administrations and hope that out progress will allow for responsible Federal action; and

- The Administration is also supportive of provisions in the crime bill which are directed toward alleviating the burdens on states heavily affected by immigration. (Senator Graham's amendment dealing with the reimbursement of states for the costs of detention of illegal immigrants).

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Divider Title: **62**

MARIEL CUBANS

ISSUE STATEMENT: Should the policy of detaining certain dangerous Mariel Cuban aliens who have completed sentences for crimes committed in the United States be reconsidered?

BACKGROUND: During the 1980 Mariel boatlift, the government of Cuba included many criminals and mentally ill persons among the Cuban nationals who fled to the United States. Those aliens with criminal backgrounds were eventually repatriated to Cuba or paroled into the United States, and thousands of the latter committed new crimes in this country. In normal situations, aliens convicted of crimes in the United States can be immediately deported or repatriated to their home countries. However, the Cuban government has refused to accept most of its nationals back.

In 1987, the Attorney General established a review program under which Mariel Cubans who have been convicted of serious crimes in the United States, and who cannot be repatriated, are subject to detention by INS. Those who are detained receive comprehensive case reviews conducted by specially trained INS officers. Detainees not deemed a potential danger to the community are recommended for parole and eventually released, while those considered a safety risk are detained for an additional year, at which time their cases are reviewed again. This process continues until parole is granted. Presently, about 1500 Mariel Cuban detainees are being held in INS custody under this program.

Some human rights advocates and elected officials have raised objections to the program, because dangerous offenders may in some instances be detained for several years without trial or sentence.

STATUS: On March 1, 1994, a detailed report and policy options paper on the program was prepared for the National Security Council by the Office of the Associate Attorney General. A follow-up meeting was held at NSC on March 18 with interested non-governmental organizations to discuss their concerns and the direction of the program.

DEPARTMENT POSITION: The program should continue as at present. The overall number of detainees in INS custody is declining, and fewer are being held today than at any previous time. Internal program enhancements, such as improved training of INS panel members, have been implemented, which have substantially reduced the risk of unfair or arbitrary parole reviews.

The majority of the current detainees have been convicted of violent offenses, including murder, rape, sexual assault, child molestation, robbery, and aggravated assault. Immediate or accelerated release of these aliens will likely result in greatly increased levels of victimization of U.S. citizens and other residents. The legality of the program has generally been upheld by the Federal Circuit Courts that have addressed the issue. One recent case in the Ninth Circuit, Barrera-Echavarria v. Rison, held in a 2-1 decision that a Mariel Cuban who had been detained for eight years, paroled briefly, and returned to INS custody due to a parole violation, should be released. The Department has petitioned for en banc rehearing of this decision.

Under Section 236(e) of the Immigration and Nationality Act, certain dangerous offenders who have committed "aggravated felonies," -- generally murder, drug offenses, and violent crimes -- and who cannot be removed from the country, must be detained by the Attorney General unless INS determines that they do not pose a threat to the safety of the community. The vast majority of the detained Mariel Cubans have committed aggravated felonies and therefore are barred by law from release without receiving the type of review that they now receive under the program.

In a recent letter to Parade Magazine, Justice Department spokesman Carl Stern stated that the "Justice Department is not violating the human rights of the Mariel detainees who require detention, and we regard any intimation to the contrary as unjust and unreasonable."

JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS: Senators Howard Metzenbaum and Dennis DeConcini have written to Attorney General Reno stating that they consider detention of Mariel Cubans a human rights violation and that the situation should be remedied -- although they do not state what the remedy should be.

REFERENCE MATERIAL: Memorandum dated March 1, 1994, from the Office of Associate Attorney General to the National Security Council.

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

March 1, 1994

MEMORANDUM

TO: Eric Schwartz
National Security Council

FROM: Office of the Associate Attorney General

RE: Report on Mariel Cuban Program and Policy Options

I OVERVIEW OF CUBAN REVIEW PROGRAM

During the 1980 Mariel boatlift, several thousand convicted criminals, mentally ill persons, and other persons undesired by the Cuban government were permitted or forced to join the tens of thousands of Cuban nationals who fled to the United States. In normal situations, criminal aliens and mentally ill persons who arrive in the United States can be excluded and removed to their country of origin. However, the Cuban government in 1980 did not accept any of its nationals back, and in 1984 only agreed to accept a limited number of the Mariel Cubans.

All of the Mariel Cubans with criminal histories were eventually paroled into the United States or repatriated. Thousands of the paroled aliens committed new crimes, and today there are about 3000 Mariel Cubans in state and Federal prisons serving criminal sentences. An additional 1500 Mariel Cubans who have committed violent crimes and/or repeated offenses while on immigration parole have been returned to INS custody following completion of their state or Federal sentences. Some severely mentally ill persons who require ongoing support and treatment also remain in INS custody. Only a small fraction of these detained individuals can currently be repatriated to Cuba. This situation has posed a difficult policy dilemma for Department of Justice officials, who are charged with enforcing immigration laws and protecting citizens against criminal aliens.

Under the present review process, which is governed by Federal regulation at 8 C.F.R. § 212.12, when a Mariel Cuban completes his criminal sentence, his background file is reviewed by INS to determine his dangerousness and/or likelihood to engage in criminal conduct. About 60 percent of the aliens reviewed through this initial screening are released and 40 percent are detained for further evaluation. Those who are detained receive within three months of their initial detention a more comprehensive parole review to determine their suitability for parole. This includes a review of the alien's records by two specially trained INS officers, and may also include a personal interview, during which the alien may be accompanied by a representative and may present oral and written information in support of his release on parole.

During this review, consideration is given to the alien's institutional progress, including participation in available educational and vocational programs, as well as his ties to the community, his criminal and disciplinary records, psychological evaluations, and any other information which helps to determine whether parole is in the public interest. The panel makes a recommendation to parole or continue to detain the alien, and the INS Assistant Commissioner renders a final decision. If approved for parole, the alien must, by regulation, be placed with suitable sponsorship. Currently, about 35 to 40 percent of the cases reviewed by the panels are recommended for parole. If a decision is made for continued detention, the alien receives a further review within one year of the decision. The director of the INS Cuban Review program has discretion to review cases at any time deemed warranted.

A comprehensive review of the Cuban review and placement process was completed in 1992 by Silbert and Associates, a consulting firm specializing in planning, assessment, and evaluation of correctional and rehabilitation programs. Several recommendations for improving the program were implemented, including more sophisticated training of review panel members, greater consistency in initial INS detention decisions, and more flexible halfway house programming and sponsorship determinations. INS was unable, due to fiscal restraints, to implement a recommendation that Cuban Review panelists be hired and employed exclusively for that task. INS also disagreed with a recommendation to discontinue mental health evaluations of the detainees conducted by the U.S. Public Health Service. The recommendations implemented have contributed to a greater number of paroles and placements, fewer initial detentions, and substantial cost savings to the Federal government. The 1500 Mariel Cubans currently in custody represent the lowest total since the beginning of the current review program in 1987. The program is currently showing a parole revocation rate of about 10%, as compared to a recidivism rate of about 40% for sentenced federal prisoners.

II GENERAL LEGAL BACKGROUND

An unadmitted alien seeking even temporary admission into the United States does so as a matter of legislative enactment rather than constitutional right. Shaughnessy v. Mezei, 345 U.S. 206 (1953). In the Immigration and Nationality Act (INA), Congress has set forth those classes of undesirable aliens who will be denied admission or "excluded" from the United States. In the usual case, when not turned away at the border, the INA requires detention and immediate physical removal of unadmitted aliens. The Act, however, also contemplates that immediate repatriation may not be "practicable or proper" in an individual case. Whether detained or paroled pending exclusion, the unadmitted alien's physical presence in this country does not constitute an entry or improve his claim to remain in the United States.

The immigration parole statute, 8 U.S.C. § 1182(d)(5)(A), authorizes the Attorney General to release an inadmissible alien from custody, yet such relief is discretionary and only "for emergent reasons or for reasons deemed strictly in the public interest," and the alien returns to custody when the purpose of parole has been served. Recent congressional amendments, codified at 8 U.S.C. § 1226(e), moreover, deny release to excluded aliens convicted of "aggravated felony" offenses unless the country to which the alien should be repatriated refuses or delays his return, and the Attorney General determines that the individual alien "will not pose a danger to the safety of other persons or property." The authority to detain an excludable alien, however, does not depend upon an aggravated felony conviction. The law (statutory and constitutional) has been consistently construed since Mezei to permit continued detention of an excluded alien who can neither be removed to his own or another country, nor safely paroled in the United States in the discretion of the Attorney General, even if that detention is prolonged. Congress has done nothing to alter this statutory and regulatory scheme, except to expand the number of countries to which an alien can be excluded, and restrict the release of aggravated felons.

The Fourth, Fifth, Ninth, and Eleventh Circuit Courts of Appeals have declined to require the Attorney General to release excludable Mariel Cuban aliens both out of deference to the political branches and because it would leave the United States powerless to protect itself from any hostile government that sent its dangerous population here and then refused to take them back. See Gisbert v. Attorney General, 988 F.2d 1437 (5th Cir. 1993); Alvarez-Mendez v. Stock, 941 F.2d 956, 959 (9th Cir. 1991), cert. denied, __ U.S. __, 113 S. Ct. 127 (1992); Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986), cert. denied, 479 U.S. 889 (1986); Garcia-Mir v. Smith 766 F.2d 1478 (11th Cir. 1985), cert. denied, 475 U.S. 1022 (1986); Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984); Palma v. Verdeyen, 676 F.2d 100 (4th Cir. 1982). See also 8 U.S.C. §§ 1101(a)(43), 1103, 1182(a), 1225(b), 1227(a). A narrow statutory analysis and constitutional dicta to the contrary adopted by the Tenth Circuit in Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981), has not been followed in other Circuits. See, e.g., Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985). The overwhelming majority of federal district courts which have addressed the issue have upheld the Attorney General's authority to detain excludable Mariel Cubans. A recent district court decision adverse to the government, Barrera-Echavarria v. Rison, No. CV 89-4156 KN(B) (C.D. Cal. 1993), has been stayed by the Ninth Circuit pending appeal.

III POSSIBLE POLICY OPTIONS

A. Immediate Release of all Post-Sentence Mariels Who Cannot Be Repatriated

Legal Implications

A blanket policy to immediately release all post-sentence Mariel Cubans irrespective of their potential danger to the public would undermine the federal immigration statutes, discussed above, intended to protect the public interest by excluding such aliens. As now written, 8 U.S.C. 1226(e)(3) (Sec. 236(e)(3) of the Act) reflects a Congressional policy pointing away from a blanket approach to excludable aggravated felons by directing an individual review of each case, consideration of the severity of the alien's offense, and a determination that the alien will not endanger other persons or property. Even a release policy that distinguished between aggravated felons and other offenders could undermine other grounds of exclusion. The Attorney General presently has discretion under 8 U.S.C. § 1182(d)(5)(A) to retain custody of other dangerous aliens by denying or revoking immigration parole if release would not be "for emergent reasons or for reasons deemed strictly in the public interest."

A blanket release policy would also diminish the ability of the Attorney General to protect the public interest by revoking parole (thereby removing the alien's incentive to avoid criminal conduct), and could also make it more difficult for the United States to ultimately enforce final orders of exclusion. A dangerous alien who wishes to avoid deportation to Cuba (as do most Mariel Cuban detainees) is likely to abscond and take other steps to conceal his identity and whereabouts. Any release policy would clearly have to be one of "parole" (and summarily revocable) in order to protect the United States against claims that the Mariels are no longer excludables, but have acquired a protected interest in remaining in this country, and are thus entitled to new deportation proceedings or avenues of relief from deportation not available to excluded aliens. How the Mariel Cubans are treated may also affect the Attorney General's authority over (and the outcome of litigation brought by) other aliens whom the United States may now or in the future have reason to detain rather than parole pending exclusion.

Benefits

Significant savings to the Federal government in administrative, detention, and placement costs.

Drawbacks

Immediate release of all detained Mariel Cubans is likely to result in greatly increased victimization of U.S. citizens and others. Over half of the current detainees have been convicted of violent offenses, including murder, rape, sexual assault, child molestation, robbery, and aggravated assault. Most of the remainder have engaged in repeated property offenses such as burglary and theft, or have engaged in violent conduct while in custody or during placement. Federal cost savings realized by release will be shifted to crime victims, as well as to state and local criminal justice systems. The United States is currently being sued by one State, and is being threatened with litigation by two others, for reimbursement of detention costs for criminal aliens. Mass release of another 1500 offenders would bolster the States' arguments that the Federal government is avoiding responsibility for criminal aliens and could lead to actions by other States. Released mentally ill detainees would lose access to treatment and most would likely become part of the nation's "homeless" population.

B. "Judge Shoob" Solution -- Greater Procedural Protections

Legal Implications

In 1984, a Federal District Court ruled in Fernandez-Roque v. Smith, 567 F.Supp. 1115 (N.D. Ga. 1983), rev'd 734 F.2d 576 (11th Cir. 1984), that Mariel Cubans should receive greater procedural protections in connection with their INS parole hearings. The proposed protections included the right to confrontation and cross-examination of adverse witnesses, counsel provided at government expense, and a requirement that the government carry the burden of proof, according to a "clear and convincing" evidence standard. This decision was subsequently reversed on appeal by the 11th Circuit. The wide range of elaborate procedures envisioned by Judge Shoob in this litigation (and similar claims that have been subsequently rejected by other circuits) were all premised on the erroneous contention that the Mariel Cuban detainees possessed a liberty interest that entitled them to be paroled in the United States if they could not be immediately repatriated. The Constitution does not guarantee aliens all the advantages of citizenship and, in this context, its reach also distinguishes between different classes of aliens. Immigration parole of excluded Mariel Cubans does not require the full panoply of procedural due process required by criminal trials, pretrial detention or other commitment determinations. Enforcement of the immigration laws are civil regulatory actions, not criminal or punitive, and these unadmitted dangerous aliens, who are neither lawfully resident here nor citizens, have no constitutional or statutory right to be admitted or paroled within the United States, even temporarily.

The only "interest" the Mariel Cuban detainees can claim to liberty is that afforded by Congress in 8 U.S.C. § 1182(d)(5)(A) and § 1226(e), which is contingent on the discretion of the Attorney General. The argument that "preventive" detention of excluded criminal aliens is unconstitutional punishment thus distorts Due Process analysis. A fundamental purpose of the immigration laws is to prevent harm to the public by aliens illegally here because their presence is harmful to the paramount social, political, or national interests of this country. Detention for this purpose is not arbitrary, nor has any difficulty in effecting repatriations to Cuba diminished the United States' interest in enforcing the exclusion of dangerous Cuban nationals from U.S. society.

Mindful that these legal realities may often be harsh for the Mariel Cuban detainees, the Attorney General has established elaborate parole review procedures, presently found at 8 C.F.R. § 212.12, that provide the Mariel Cuban detainees with periodic reconsideration for parole. These procedures -- like the more recent Congressional amendment regarding aggravated felons -- do not create any entitlement to release, but preserve the Attorney General's authority to enforce the immigration statutes and her discretion to determine whether parole of an excluded criminal alien into the United States is in the public interest. The alien's past misdeeds and other factors weighed in the review process are relevant only insofar as they are probative of the individual alien's ability to live in the community in the future without further endangering its lawful population.

Aside from being unnecessary as a matter of law, the procedures envisioned by Judge Shoob would shift to the government the burden of proof which Congress has squarely placed on the alien who seeks to come into the United States. In the absence of any reliable information about such aliens beyond what they cared to provide, Judge Shoob's procedures would impose a costly if not impossible task for the government to establish that continued detention was justified. The Mariel Cubans are a case in point; although thousands admitted to some kind of criminal history or incarceration in Cuba, no official records were provided to the United States, and the aliens' own accounts of their offenses in Cuba, as well as their records in this country, have varied or otherwise proved unreliable over the years. This approach also runs the risk of being construed as creating a liberty interest for excludable aliens that would more than likely involve the courts or spill over into other contexts.

Benefits

Would reduce the perception held by some that Mariel Cubans are being detained arbitrarily.

Drawbacks

Predicting dangerousness is difficult, therefore it would be nearly impossible for the government to meet a "clear and convincing" test that an alien will pose a threat to persons or property. Could be construed as creating rights for detained Mariel Cubans which would likely be claimed by other excludable aliens. The significant added procedural protections would also be costly, calling for counsel at government expense and expanded hearings.

C. Continue Current Program

Legal Implications

The present exercise of the Attorney General's immigration parole and detention authority strikes a reasonable balance between the national interests protected by the INA and the humanitarian concerns resulting from Cuba's unlawful actions in sending thousands of inadmissible criminal aliens to this country. It also conforms with over forty years of consistent judicial, administrative, and congressional construction of United States immigration law. The regulations at 8 C.F.R. § 212.12 adequately protect any limited interest the excluded Mariel Cuban detainees may have in being temporarily paroled into this country.

Benefits

Little or no additional administrative cost to the Federal government. Internal program enhancements have been and are being implemented which substantially reduce the risk of unfair or arbitrary parole determinations. Under the current program, the total number of post-sentence detainees has consistently declined and will continue to decline.

Drawbacks

Unlikely to satisfy critics who believe that detainees are being held arbitrarily.

cc: Roger Adams, ODAG
Kathleen Hawk, BOP
Frank Holleman, OIL
Doris Meissner, INS

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Divider Title: **63**

MASS IMMIGRATION EMERGENCY PLAN

ISSUE STATEMENT: What is the status of preparations by the Federal Government to respond to a mass immigration emergency?

BACKGROUND: A revised Federal Mass Immigration Emergency Plan, is in the final stages of development. The plan provides guidelines for a coordinated effort by the Federal government, at the national, regional, and local level, to enforce Federal laws to deter, interdict, and control massive illegal immigration to the United States. It draws on the resources and authority of 37 Federal departments and agencies, with the support of State and local government and voluntary agencies, to work together to maintain the integrity of our national borders, protect public health, and control the admission of immigrants and refugees. The Plan was developed through coordination of the Department of Justice, the Immigration and Naturalization Service Intelligence Division, the INS Regional and District Offices, and Border Patrol sectors. The Florida Governor's Office has also been closely involved in the planning process.

The Associate Attorney General plays a pivotal role in the implementation of the plan. As the Immigration Emergency Federal Coordinating Officer (IEFCO), he has responsibility for coordinating overall immigration emergency response activities, addressing issues and problems which require national-level decisions or direction, determining and coordinating State agency support requirements, and directing Federal agencies to perform missions and operations, including additional actions not specifically addressed in the plan which may become necessary.

STATUS: Revisions to the February 1994 draft of the plan are now being made to reflect requested agency changes and the recent reorganization of the Immigration and Naturalization Service. These changes are minor, and the plan is currently operational as written. Once all participating federal agencies have signed on to their respective roles, a tabletop exercise in Florida will be arranged. Particular issues in the implementation of the plan are as follows:

Temporary Staging Facility

An important aspect of the plan is the establishment of a Temporary Staging Facility (TSF) for detaining aliens for a short time while preparations are made to transport them to long term detention centers for processing by INS, Public Health Service, other agencies. Aliens will be screened to determine their identity and relationships, and will be provided medical treatment if necessary. When it is determined that aliens are medically fit for travel, they will be scheduled for transportation. It is expected that most aliens will not remain in a TSF for longer than two days.

The local effort to finalize arrangements for a temporary detention facility in South Florida is being coordinated by the INS District Director in Miami. Officials of INS, the General Services Administration (GSA), the State of Florida, and Dade County have identified a portion of Homestead Air Force Base as the best candidate site for the establishment of a temporary detention facility. They are currently negotiating with the Air Force Base Conversion Agency (AFBCA) to acquire or arrange for the use of the site. A proposed memorandum of understanding between the AFBCA and the INS has been drafted and is being circulated among the participating agencies. Further discussions with GSA, the Federal Emergency Management Agency and State and local agencies have outlined the equipment and logistical support necessary to establish and operate a detention facility on this site.

An alternative site, in the event that Homestead AFB is not available or usable, has been identified at the Opa-Locka Airfield. This site has all the necessary water, sewer, and electrical facilities, which could be activated in a short time period.

<u>State and Local Law Enforcement Assistance</u>

An essential element of the plan is the reliance on State and local law enforcement officers to assist INS in arrests and detention of aliens. The plan currently calls for the U.S. Marshals Service to deputize such officers to supplement federal emergency personnel. Arrangements have been made between the United States Marshals Service and the Florida Department of Law Enforcement for the immediate deputation of qualified State and local police officers in the event their services are necessary. Authority to deputize these officers has been delegated from the Deputy Attorney General to the Director of the United States Marshals Service, and the names of the officers to be deputized have been provided to both the Marshals Service and the INS. Over the next month, these individuals will be trained by INS to execute the immigration enforcement responsibilities outlined in the deputation arrangement.

The Marshals Service is not normally involved in immigration enforcement, and it does not view the use of its deputation authority as a desirable long-term solution. An alternative is being explored involving the signing of a mutual aid agreement between INS and Florida, which would permit State and local officers to assist the INS in an emergency. Because INS does not currently have the authority to confer such authority, federal legislation providing such authority may be necessary.

<u>Immigration Emergency Fund & Regulations</u>

Congress has appropriated $36.4 million for disbursement from the Immigration Emergency Fund. The fund can be triggered in one of two ways: 1) by the Attorney General, who has discretion to disburse $20 million of the fund to reimburse states or localities for the costs of providing assistance to INS in an emergency, and 2) by a Presidential declaration of emergency, requiring certification to the Judiciary Committees of the House and Senate that an immigration emergency exists. The President has discretion to use the entire amount of the fund, and, pursuant to OLC opinion, for a broader range of purposes than just reimbursing the states.

Immigration Emergency Fund Regulations setting forth the guidelines for applications from the states for reimbursement were published in the Federal Register in late November. Comments have been received by INS and have been integrated into a proposed final rule, which will be published shortly.

DOJ POSITION: Supports expedited efforts to finalize and test the revised plan.

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Divider Title: ______________________________

INS ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION

1. ISSUE STATEMENT: Each year the United States legally admits over 335 million noncitizens, primarily for temporary visits. Along with these legal admissions come a far smaller number of persons seeking entry without proper documentation. Estimates of the size and flow of this unauthorized alien population over the last two decades have generally been characterized by speculation and exaggeration. Better estimates have been needed to target enforcement efforts and to help determine the impact of this population nationally and on local areas.

Because of the need for more precise estimates of this unauthorized population, INS has worked with Bureau of the Census and other researchers to develop credible estimates based on the best survey and administrative data available.

2. STATUS: INS has recently completed an analysis of the size, origin, and state of residence of the undocumented alien population in the United States in coordination with the Bureau of the Census and other researchers. This analysis is based on Census and INS data for major sending countries and receiving states. Based on this research:

o INS estimates that the <u>resident</u> unauthorized immigrant population in October 1992 was 3.4 million and growing at a rate of about 300,000 annually. This means that the current resident unauthorized population in the United States is about 3.8 million. These figures do not include an unknown number of temporary migrants who enter for temporary periods and depart.

o About half of the unauthorized immigrant population initially entered legally as visitors but did not leave. The remaining portion entered illegally across land borders.

o The largest number of unauthorized migrants--about 39 percent of the total--come from Mexico, followed by El Salvador, which accounts for about 10 percent. Other sizeable numbers come from Guatemala, Canada, Haiti, the Philippines, and Poland.

o Unauthorized migrants tend to settle in the same states as legal residents and many U.S. citizens. Eighty-five percent of all unauthorized immigrants live in six states--California (43 percent), New York (13 percent), Texas (11 percent), Florida (10 percent), Illinois (5 percent), and New Jersey (3 percent).

o The legalization program in the late 1980's had a significant impact on the size, composition, and distribution of the resident unauthorized immigrant population.

- The unauthorized immigrant population was reduced from about 5 million in early 1987, to about 2 million in late 1988, with the largest reduction being in the number of unauthorized migrants from Mexico.

- Because of the large number of unauthorized migrants from Mexico living in California who qualified for and were granted legal status through the legalization and special agricultural worker programs, the proportion of the unauthorized migrant population living in California dropped from about 50 percent prior to legalization to about 43 percent currently. The INS estimates by State improve on earlier Census Bureau figures by taking into account the shift in the geographic distribution of unauthorized immigrants that resulted from the legalization program.

3. DEPARTMENT'S POSITION: The Department of Justice supports this research and its findings.

4. CONGRESSIONAL INTEREST: Members of Congress have been interested in these estimates primarily as they relate to the number and impact of undocumented immigrants resident in their states. Some states such as California, have developed independent estimates. However, following their release, the INS estimates are being widely accepted as the best estimates available.