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INS General Counsel Opinions

1991 GENERAL COUNSEL'S OPINIONS

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Genco Opinion 91-1

Legal Opinion Your March 29, 1990 Memorandum: Applicability of Sections 212(a)(22) and 315 of the Immigration and

Nationality Act to —

John Schroeder, Assistant Commissioner, COADN

January 2, 1991

ATTN: R. Michael Miller, Deputy Assistant Commissioner

I. QUESTION

In the subject memorandum, you request a Legal Opinion concerning the following question:

Is —, an alien ineligible to citizenship?

II. SUMMARY CONCLUSION

— is not ineligible to citizenship.

III. ANALYSIS

Is Not Ineligible to Citizenship

A. Facts

— is a native and citizen of Argentina. On April 10, 1964, he entered the United States as an alien lawfully admitted for permanent residence. On August 19, 1966, he was ordered to report for induction into the Armed Forces of the United States. He applied for and received an exemption from compulsory service, on the basis of his alienage. His alien file contains a photocopy of a March 1, 1966, certification from the Argentine Consul that Mr. — had performed his compulsory military service in Argentina.

Mr. — was not actually inducted. It is not clear from his file, however, whether he was actually granted an exemption from service, or whether the Selective Service changed his draft eligibility classification from I-A.

B. Discussion

An alien is ineligible to citizenship if he applied for and received an exemption from compulsory military service because of alienage. INA 315(a), 8 U.S.C. 1426(a). The alien is also subject to exclusion from the United States. Id. 212(a)(22), 8 U.S.C. 1182(a)(22). In order to bar an alien from citizenship, however, the exemption from service must be permanent. Astrup v. INS, 402 U.S. 509 (1971).

There are at least two conflicting court of appeals decisions applying Astrup. The Second Circuit has held that an alien did not receive a permanent exemption from service because, although he was never ordered to report for induction, he had been reclassified as I-A after having been relieved from his service obligation.

Villamar v. United States, 651 F.2d 116 (2d Cir. 1981). The Third Circuit, however, held that an alien who was relieved of his service obligation, and never again ordered to report for induction, had received a permanent exemption from service, although he remained classified as I-A.

Mr. —'s case does not require a resolution of this conflict. Congress recently amended Section 315 by adding the fol-

lowing new subsection:

> (c) An alien shall not be ineligible for citizenship under this section or otherwise because of an exemption from training or service in the Armed Forces of the United States pursuant to the exercise of rights under a treaty, if before the time of the exercise of such rights the alien served in the Armed Forces of a foreign country of which the alien was a national.

Immigration Act of 1990, Pub. L. No. 100-649, 404(a), 104 Stat. 4978, —. (1990). This provision took effect November 29, 1990. Id., 408(e), 104 Stat. at —. Mr. — was entitled to an exemption under a treaty with Argentina. Treaty of Friendship, Commerce, and Navigation, July 27, 1853, United States-Argentina, art. X, 10 Stat. 1005, 1009. Thus, even if Mr. — exemption from service was permanent, he is no longer ineligible to citizenship. It follows that he is no longer subject to exclusion under Section 212(a)(22).

/s/ Paul W. Virtue
Acting

Genco Opinion 91-2

Legal Opinion: Your September 17, 1990 wire 11793; advisory opinion regarding petitioners who appear to have abandoned lawful permanent residence

Anthony F. Lascaris, Officer-in-Charge, Athens, Greece

CO 105.13-C

CO 204.21-C

January 9, 1991

QUESTIONS

You state that you have received several referrals regarding entitlement to benefits derived from visa petitions filed by purported lawful permanent residents who appear either never to have taken up residence in the United States or to have abandoned any such residence. Specifically, you ask:

> whether the petitioners have the burden of proving that they are lawful permanent residents in order to confer these benefits (you state that you are not attacking their resident status per se); and
>
> whether the petition would be subject to revocation if, during the pendency of the petition, the petitioner lost status by extended absence but somehow re-entered the U.S. without a challenge to his status.

You state that this request is the third follow-up to a similar request originally made on June 6, 1990. We have no record of any of your earlier requests. We have attached our recent response to a related question.

SUMMARY CONCLUSIONS

Petitioners do have the burden to show that they are lawful permanent residents entitled to confer immigration benefits on their relatives. They may be found not to have carried that burden when their status is in question. A denial of a visa petition in such circumstances is not a final determination regarding the status of the petitioner.

Petitions may be revoked for good cause, but before a decision is made on revocation in a case of this type, the petitioner must be given an opportunity to rebut the allegations concerning his loss of status. Then the petitioner must be notified of the revocation at his last known address and the beneficiary must also be notified before he commences his journey to the United States.

ANALYSIS

The Board of Immigration Appeals Has Held That a Visa Petition May Be Properly Denied When the Petitioner Fails to Establish His Lawful Permanent Residence, Even Though No Adjudication of Abandonment of Residence Has Been Made

In visa petition proceedings, the petitioner has the burden of proving every factor that he claims entitles him to confer immigrant status on the beneficiary of his petition. Matter of Patel, Interim Decision 3083 (BIA 1988); Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966).

The Board has held that, when a substantial doubt exists regarding whether the petitioner obtained lawful permanent residence lawfully or whether he has abandoned lawful permanent residence, it is not necessary to overlook these questions until the petitioner's status has been independently adjudicated. Matter of Abdoulin, 17 I&N Dec. 458 (BIA 1980); Matter of Abdelhadi, 15 I&N Dec. 383 (BIA 1975).

When the petitioner is outside the United States and is therefore not amenable to deportation or exclusion proceedings, the visa petition may properly be denied, but this is not a definitive adjudication of the petitioner's permanent resident status. Matter of Umale, 16 I&N Dec. 682 (BIA 1979); Matter of Abdoulin, supra; Matter of Abdelhadi, supra. The petitioner remains a lawful permanent resident until the Government proves otherwise in deportation or exclusion proceedings against him or her, id., or until the petitioner voluntarily abandons residence and adjusts to nonimmigrant status, INA 247, 8 C.F.R. 247, or leaves the United States and executes a Form I-407, Abandonment of Lawful Permanent Resident Status. Operations Instructions 215.1(a), 235.1(k)(3).

Approval of a Visa Petition May Be Revoked for Good Cause If the Petitioner and Beneficiary Are Notified Before the Beneficiary Commences His Journey to the United States

If a visa petition filed by a petitioner abroad is granted in error, it may be revoked for "good and sufficient cause" as long as the petitioner is notified of the revocation at his last known address and the beneficiary is notified before he commences his journey to the United States. Immigration and Nationality Act, 205; 8 C.F.R. 205.2. The petitioner must be given an opportunity to rebut the allegations in the notice of intention to revoke in a case of this type. 8 C.F.R. 205.2.

/s/ Paul W. Virtue
Acting
Attachment

Genco Opinion 91-3

Legal Opinion: Return of seized but not forfeited firearms

Curtis Clark, Investigations Branch, Northern Region

CO 925

January 10, 1991

I. QUESTION

Whether the Immigration and Naturalization Service is required to return, to a lawful permanent resident alien, firearms which were properly seized but not timely forfeited.

II. SUMMARY CONCLUSION

Firearms which were not forfeited within the statutory period should be returned to the owner, provided that owner is legally entitled to possess firearms. As the alien involved is now a lawful permanent resident, the firearms should be returned to him upon execution of a hold harmless agreement.

III. ANALYSIS

The alien, an out-of-status student, was arrested on December 7, 1983, pursuant to an Order to Show Cause and Warrant of Arrest. The arresting officers observed two shotguns mounted on the wall, which were ascertained to be owned by the alien. These guns were seized pursuant to 18 U.S.C. App 1202(a)(5) (1983), presently codified at 18 U.S.C. 922(g)(5), which forbids possession of firearms by an alien unlawfully in the United States. The alien demanded return of the shotguns on December 29, 1983, but was informed that they would be forfeited. However, forfeiture was never begun. The alien, now a lawful permanent resident, has renewed his request for return of the shotguns.

Forfeiture is entirely a creature of statute, and property may be forfeited only upon the terms and conditions of the authorizing law. The section of law authorizing forfeiture of firearms possessed by illegal aliens is 18 U.S.C. 924(d)(1), which states in part:

> Provided, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, the seized firearms or ammunition shall be returned forthwith … unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

While it is clear that seizure and forfeiture of the shotguns was entirely appropriate in 1983, the failure to begin forfeiture proceedings within the 120-day statutory period effectively forecloses that possibility. Although 924(d)(1) does not specifically address the instant situation, there is no provision of law that permits continued retention of the guns. It would seem appropriate to return the firearms to the owner, if he were legally eligible to possess them.

The alien was not eligible to possess these shotguns until he rendered his presence in the United States lawful, and his request was thus properly rejected. However, he is now a lawful permanent resident. Therefore, the firearms should be returned.

Genco Opinion 91-4

Legal Opinion: Classification of alien crewmen and casino operators aboard "cruises to nowhere" - the M/V Southern Elegance

James A. Puleo, Associate Commissioner, COEXM

CO 235-C

CO 252-C

CO 274A-C

January 11, 1991

QUESTIONS

Before addressing the issues you raised regarding classification of certain crewmen and casino operators aboard "cruises to nowhere," the following issue must be considered.

A. May the owner/operators of gambling ships employ nonimmigrant aliens to work on gambling vessels when criminal provisions prohibit the operation of such vessels by United States citizens (USCs) and lawful permanent residents (LPRs)?

In your memorandum, you ask the following questions.

B. Does the foreign sailing of a vessel for the sole purpose of satisfying Section 252 of the Immigration and Nationality Act (INA) suffice to allow the vessel and its nonimmigrant alien crew to operate in the United States on a permanent basis?

C. What is the proper nonimmigrant classification for aliens employed on board the M/V Southern Elegance who seek to land in the United States as crewmen?

D. If D is not the proper visa classification for casino operators on board the Southern Elegance, does their employment on the vessel during "cruises to nowhere" constitute employment in the United States and, therefore, a violation of Section 274A of the INA?

SUMMARY CONCLUSIONS

A. The criminal provisions that prohibit the ownership and operation of gambling ships by USCs and LPRs also prohibit the employment of nonimmigrant aliens on such vessels.

B. Undertaking a brief foreign sailing every 29 days merely to comply with Section 252 of the INA will not suffice to allow a vessel and its nonimmigrant alien crew to operate permanently in the United States.

C. Aliens employed in any capacity on board "cruises to nowhere" such as those conducted by the Southern Elegance do not qualify for any nonimmigrant visa classification.

D. Aliens employed on "cruises to nowhere" who are classified as nonimmigrant crewmen are not in violation of their nonimmigrant status as long as they are performing traditional crewman functions. However, if such alien employees perform other labor or services within the three mile limit of the territorial waters of the United States, the Southern Elegance would be in violation of Section 274A of the INA.

FACTUAL BACKGROUND

The Southern Elegance, a Panamanian flagged vessel, arrived in Gulfport, MS in February 1990. The vessel is owned and operated by United States citizens. It has a crew of approximately 25 nonimmigrant aliens and an undetermined number of United States citizens and lawful permanent resident aliens. Upon inspection, two casino operators, citizens of the United Kingdom, were refused entry as nonimmigrant crewmen. Admission was refused on the basis that the

casino operators were not employed on board the vessel at the time of inspection because the casinos were closed. After their D-1 and B-2 visas were cancelled, the casino operators withdrew their applications for admission and departed foreign.

The Southern Elegance is a vessel with a capacity of approximately 400 passengers. The vessel makes daily "cruises to nowhere" for gambling purposes. The vessel is not capable of accommodating passengers on a foreign sailing (it only accommodates 30 crewmembers overnight) and does not, in fact, transport passengers to a foreign port or place.

The Southern Elegance, like many other vessels conducting gambling "cruises to nowhere," does not have living quarters for its crew. The vessel's crew does not live on board the ship except to take part in a foreign sailing once a month. Generally, members of the crew live in apartments ashore. The operators of the vessel plan to comply with the provisions of Section 252 of the INA by sailing to Mexico every 29 days carrying only the alien crew, including the casino operators. The vessel does not carry passengers on the foreign sailings.

IV. ANALYSIS

A. Criminal Provisions That Prohibit the Ownership and Operation of Gambling Ships by USCs and LPRs Also Prohibit the Employment of Nonimmigrant Aliens on Such Vessels

The United States criminal code prohibits the operation of gambling ships by USCs, LPRs, or any other persons "otherwise under or within the jurisdiction of the United States." 18 U.S.C. 1082 (1990). The provision at Section 1082 of Title 18, United States Code, prohibits setting up, operating, owning, holding an interest in any gambling ship or similar establishment, conducting or dealing any gambling game, operating any gambling device, or inducing, enticing, soliciting or permitting any person to bet or play at any such establishment. Id. This provision appears to apply not only to "American vessels,"[FN1] but also to any vessel "otherwise under or within the jurisdiction of the United States." Id. Exactly which vessels are included in this latter group remains unclear. However, the provision attempts to reach the activities prescribed even when they occur on the high seas (i.e., beyond the 12-mile limit of the territorial waters). The territorial aspect of the statutory language withstood constitutional challenge in the only case to interpret this provision. United States v. Black, 291 F. Supp. 262 (S.D.N.Y. 1968).

It has been suggested to the Immigration and Naturalization Service (INS/Service) that because the provision at 18 U.S.C. 1082 prohibits the employment of USCs and LPRs on board gambling ships, such establishments must operate with nonimmigrant alien crews. In addition to USCs and LPRs, however, Section 1082 also applies to "any other person who is on an American vessel or is otherwise under or within the jurisdiction of the United States … ." 18 U.S.C. 1082(a). We believe this language also encompasses nonimmigrant aliens employed on board such gambling ships. Therefore, if this provision is enforced against individuals operating gambling cruises, the fact that nonimmigrant aliens operate the cruises is not a valid defense. Nonimmigrant alien crewmen, who are employed on board American vessels conducting gambling cruises, are engaging in an activity prohibited by a criminal statute of the United States. Consequently, the Service can refuse to admit to the United States nonimmigrant alien crewmen who are employed on board such vessels.[FN2]

The following analysis addresses the issues raised by the Service. It applies to alien crewmen employed on board vessels engaged in an activity not prohibited by the laws of the United States as well as those employed on board foreign owned and foreign registered vessels which may fall outside the scope of 18 U.S.C. 1082.

B. Foreign Vessels and Their Nonimmigrant Crews May not Work or Operate Permanently in the United States by Merely Complying with the Foreign Sailing Requirement of Section 252 of the INA

Section 252 of the INA and its implementing regulations do not authorize alien crewmen to reside and work in the

United States. Section 252 was intended to address an alien crewman's need for temporary shore leave or for the "conduct of foreign commerce." See 8 C.F.R. 252.1(d); H.R. Rep. No. 1365, 82d Cong., 2d. Sess., reprinted in 1952 U.S. Code Cong. & Ad. News 1653, 1722.

1. The alien crew of the Southern Elegance is landing in the United States for other than temporary periods of time

Section 252 of the INA provides immigration officers with the discretion to grant an alien crewman a conditional permit to land temporarily in the United States. INA 252(a), 8 U.S.C. 1282(a). This section states that permission to land temporarily in the United States is not to exceed the lesser of 29 days or the length of time the vessel on which the alien crewman arrived remains in the United States. Id. The purposes of this provision are to grant alien crewmen shore leave and permit them to make the are to grant alien crewmen shore leave and permit them to make the necessary arrangements to engage in foreign commerce. Section 252 does not authorize foreign vessels nor their crews to engage in permanent operations in the United States.

The Service's regulations authorize the temporary landing of alien crewmen for:

> (1) Shore leave purposes during the period of time the vessel or aircraft is in the port of arrival or other ports in the United States to which it proceeds directly without touching at a foreign port or place, not exceeding 29 days in the aggregate, if the immigration officer is satisfied that the crewman intends to depart … or (2) the purpose of departing from the United States as a crewman on a vessel other than the one on which he arrived, or departing as a passenger by means of other transportation, within a period of 29 days, if the immigration officer is satisfied that the crewman intends to depart in that manner … .

8 C.F.R. 252.1(d) (1990). Under the provisions of the INA and the Service's regulations, alien crewmen may be granted permission to land in the United States only for temporary periods of time. Such crewmen must demonstrate an intent to depart the United States.

Similarly, the legislative history of Section 252 of the INA indicates that alien crewmen arriving in the United States will be permitted "to land temporarily for such periods of time as is [sic] necessary to maintain normal operations in the conduct of foreign commerce." H.R. Rep. No. 1365, 82d Cong., 2d Sess., reprinted in 1952 U.S. Code Cong. & Ad. News 1653, 1722 (emphasis supplied).

The alien crewmen of the Southern Elegance keep apartments ashore, perform their duties on the vessel on daily excursions, return to their apartments at the end of the day, and depart foreign for short periods of time every 29 days.[FN3] Such activity suggests that the alien crew of the Southern Elegance are not merely present temporarily for shore leave, to conduct ship's business or "to maintain normal operations in the conduct of foreign commerce." The alien crew of the Southern Elegance actually remains in the United States permanently and departs temporarily. Section 252 of the INA does not authorize such practice.

2. The Southern Elegance and its crew are not engaged in foreign commerce

The crew of the Southern Elegance does not engage in foreign commerce when it boards passengers in the United States, transports them into international waters, and subsequently returns them to the United States. If the vessel is not engaged in foreign commerce, then it must be operating solely in the domestic commerce of the United States. There is some indication to support this position.

The Southern Elegance makes daily cruises from Gulfport, MS with approximately 400 passengers aboard. The vessel sails beyond the territorial waters of the United States but does not enter a foreign port or place prior to returning to Gulfport at the end of the cruise. The vessel cannot accommodate the 400 passengers on an excursion that would constitute a departure from the United States. Consequently, the passengers on board the vessel do not enter a foreign port or

place. Therefore, for immigration purposes, the vessel does not make a daily departure from the United States when it sails with its passengers out of United States territorial waters.[FN4] The Southern Elegance departs from the United States once a month when only the nonimmigrant alien crew sails to Mexico. During these trips the vessel's gambling facilities are closed. If the vessel does not depart the United States when it is in full operation, departs the United States when it is not operating, does not engage in any gambling operations while at a foreign port or place, and reenters the United States with its gambling operations closed, then it may be concluded that the Southern Elegance is operating solely in the domestic commerce of the United States and is not engaged in foreign commerce.

Section 252 of the INA does not authorize a foreign vessel or its crew to operate permanently in the United States. Section 252 merely permits discretionary temporary shore leave for alien crewmen and facilitates the conduct of foreign commerce. It appears that, by permitting its alien crewmen to remain in the United States on other than a temporary basis and failing to engage in foreign commerce, the current practices of the Southern Elegance violate the intent of Section 252.

C. Aliens Employed on Board the Southern Elegance Do Not Qualify for Nonimmigrant Visas

The aliens employed on board the Southern Elegance and other "cruises to nowhere" are not eligible for nonimmigrant visas. The aliens currently classified as crewmen do not meet all the criteria for a D visa, despite the fact that they perform crewman duties. Similarly, aliens employed on board the Southern Elegance are also ineligible for visitor and H-2 temporary worker visas. For the following reasons we conclude that aliens employed on "cruises to nowhere" do not qualify for any nonimmigrant alien classification.

1. Aliens employed on the Southern Elegance do not qualify for nonimmigrant crewman visas

The INA defines crewmen in two sections. Section 101(a)(10) of the INA defines the term "crewman" as "a person serving in any capacity on board a vessel or aircraft." INA 101(a)(10), 8 U.S.C. 1101(a)(10). Section 101(a)(15)(D) of the INA defines an alien crewman who is eligible for a nonimmigrant visa as,

> "an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel … or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft."

INA 101(a)(15)(D)(i), 8 U.S.C. 1101(a)(15)(D)(i) (emphasis supplied). This statutory language indicates that a crewman may enter the United States as a nonimmigrant if he or she 1) serves in any capacity required for normal operation and service on board a vessel; 2) intends to land temporarily in pursuit of his or her calling; and 3) intends to depart the United States. Id. The statutory language describes the nonimmigrant crewman's landing in the United States as "temporary." This suggests that an alien crewman's departure from the United States should be of a longer duration than his or her temporary stay.

a. Aliens employed on board the Southern Elegance do not intend to land temporarily in the United States

In order to qualify for a nonimmigrant crewman visa, an alien must "intend to land temporarily" and "to depart the United States." For the following reasons, we do not believe that aliens employed on board the Southern Elegance demonstrate such intent. First, the aliens employed on the Southern Elegance, and other "cruises to nowhere," do not live on board the vessel they serve. Instead, they live in apartments on shore. If the alien crew on these vessels truly intended to remain in the United States temporarily, there would not be a need to maintain living accommodations off the vessel. Usually, alien sea crewmen have living quarters on board the vessels they serve. Second, these aliens remain in the United States for up to 29 days at a time, depart the United States for a day or two, just long enough to make a foreign

sailing, and return to the United States for another 29 days. It is difficult to categorize as a temporary landing a stay of 29 days in the United States and a departure for a day or two before returning to the United States. Finally, the fact that the vessel sails foreign once a month with only the alien crew on board and the gambling facilities closed indicates that the sole purpose for the foreign sailing is to maintain the D classification of the aliens and not to engage in foreign commerce.

The legislative history of Section 101(a)(15)(D) of the INA indicates that cruises to nowhere are currently engaged in a practice Congress intended to prevent. Section 101(a)(15)(D) excludes from the definition of a nonimmigrant crewman aliens serving on board "a fishing vessel having its home port or an operating base in the United States." INA 101(a)(15)(D), 8 U.S.C. 1101(a)(15)(D). The legislative history of this section states that:

> [i]t is the information of the committee that in some instances fishing vessels with home ports in the United States sign on alien fishermen in foreign ports, and such fishermen apply for temporary admission as nonimmigrants upon the return of the vessels to the United States port. Thereafter, the aliens continue in their employment on the vessels and by making periodic trips are enabled to reside permanently in the United States without having been lawfully admitted for permanent residence. The exclusion of such aliens from the class of nonimmigrant crewmen will assist in assuring that nonimmigrant status is extended only to bona fide crewmen.

H.R. Rep. No. 1365, 82d Cong., 2d Sess., reprinted in 1952 U.S. Code Cong. & Ad. News 1653, 1696–97. Today, aliens employed on board "cruises to nowhere" are engaged in the same practice that Congress intended to prevent with regard to fishermen in 1952. While aliens employed on "cruises to nowhere" are not fishermen, who are specifically excluded from the definition of a crewman for visa purposes, their employment on such vessels violates the congressional intent behind the D visa classification. The Service should not continue to admit such aliens in D visa status.

2. Aliens employed on "cruises to nowhere" should not be classified as visitors for business or visitors for pleasure

The INA provides nonimmigrant visa classifications for visitors for business or pleasure. INA 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B). Aliens employed on "cruises to nowhere" would not be eligible for business visitor visas because navigating a vessel or otherwise servicing passengers on board a vessel does not qualify as the type of business endeavor required for the B-1 visa classification. See 8 C.F.R. 214.2(b); 22 C.F.R. 41.31(b); 9 FAM 41.31 n. N5–N8 (1988) (identifying business activities appropriate for a business visa). If such aliens are admitted as visitors for pleasure, they cannot engage in any employment in the United States. 8 C.F.R. 214.1(e) (1990). Consequently, the visitor visa classification is inappropriate for aliens employed on "cruises to nowhere."

3. Aliens employed on board "cruises to nowhere" are not eligible for H-2B temporary worker visa status

The INA and its implementing regulations allow the admission to the United States of aliens coming to perform temporary services or labor. INA 101(a)(15)(H), 8 U.S.C. 1101(a)(15)(H); 8 C.F.R. 214.2(h). To qualify for the H-2B visa classification, an alien must be one "who is coming temporarily to the United States to perform temporary [nonagricultural] services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers." 55 Fed. Reg. 2606, 2626 (Jan. 26, 1990), codified at 8 C.F.R. 214.2(h)(5). Eligibility for this visa classification depends on a labor certification that there are not sufficient United States workers to fill the jobs available as well as the employer's temporary need for the foreign worker. Id.; see Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982).

In the case of the Southern Elegance, and other similar gambling ventures, it is unlikely that the Department of Labor would issue a labor certification for an activity that is prohibited under United States law and for which there exists no labor market in the United States. In the case of "cruises to nowhere" that are not engaged in prohibited activities,

the vessel owner/operators still have the difficult task of demonstrating a shortage of American labor for the jobs in question. Finally, the H-2B visa classification would not be available to alien crewmen employed on foreign owned vessels because such vessel owners are not United States employers. Consequently, it is highly unlikely that the owner/operators of the Southern Elegance, and other "cruises to nowhere," could get a labor certification to qualify alien workers for H-2B visas.

Employment of aliens on board the Southern Elegance to conduct "cruises to nowhere" must be done in compliance with the immigration laws of the United States. Even if the criminal statutes did not prohibit the activity they are engaged in, the aliens employed on board the Southern Elegance do not meet the requirements for a nonimmigrant visa classification that would permit their employment on board cruises to nowhere.

D. Nonimmigrant Crewmen Employed on "Cruises to Nowhere" Are not in Violation of Their D Status if They Are Performing Traditional Crewman Functions but the Southern Elegance Would Violate Section 274A of the INA by Using Aliens Who Are not Authorized to be Employed in the United States to Operate Such Cruises[FN5]

Section 274A of the INA prohibits the employment in the United States of unauthorized aliens. INA 274A(a), 274A(a)(h)(3), 8 U.S.C. 1324a(a), (h)(3). The Service's regulations indicate which aliens are authorized to accept employment in the United States. 8 C.F.R. 274a.12 (1990). Section 274A and its implementing regulations provide fines for failure to comply with the employment provisions. INA 274A(e)(4)–(5), 8 U.S.C. 1324a(e)(4)–(5). The employer sanctions provisions apply within the United States, that is, once a vessel or aircraft has arrived in the United States and been inspected. 55 Fed. Reg. 25928, 25931 (June 25, 1990), to be codified at 8 C.F.R. 274a.1(h).

Currently, the Service is accepting the D visa classification for aliens employed on "cruises to nowhere" who are engaged in the normal operation and service of the vessel. By definition, aliens who are in D visa status and who perform traditional crewman duties on board a vessel or aircraft are not deemed to be employed in the United States. See id. (defining the term "employment"). If the aliens on board the Southern Elegance who currently possess D visas perform labor or services not related to the navigation of the vessel within the three mile limit of the territorial waters of the United States, the Southern Elegance would be in violation of the employer sanctions provisions because the crewmen are not authorized to work in the United States. Id.

Any aliens employed on board the Southern Elegance, who are not in D status, must have employment authorization in order to perform their duties within the three mile limit of the territorial waters of the United States. If they are not authorized for such employment, the Southern Elegance is in violation of Section 274A. If alien crewmen on board the Southern Elegance are performing tasks such as taking tickets, serving food or drinks, or providing some other service, and if these tasks are performed within the three mile limit of the territorial waters of the United States, there may be a violation of Section 274A.

It cannot be determined conclusively from the facts provided whether the owner/operators of the Southern Elegance have violated Section 274A of the INA.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-5

Legal Opinion: Your CO-235-C Memorandum of July 26, 1990 re: Carrier liability for the detention expenses of airline stowaways

Harvey L. Adler, Deputy Assistant Commissioner, Office of Inspections, Jan Ting, Director, Office of Refugees, Asylum, and Parole

CO 235-C

CO 237-C

CO 273-C

January 11, 1991

I. QUESTIONS PRESENTED

The subject memorandum requests a Legal Opinion regarding the following questions:

A. whether the Immigration and Naturalization Service (INS/Service) may declare an alien arriving in the United States without travel documents to be a stowaway;

B. whether airline carriers are liable for the detention expenses of stowaways who request asylum upon their arrival in the United States.

II. SUMMARY CONCLUSIONS

A. The Service may not declare an alien arriving in the United States to be a "stowaway" solely for lack of travel documents.

B. The provisions in sections 237(b) and 273(d) of the Immigration and Nationality Act (INA) make carriers liable for the detention expenses of aliens whom they transport to the United States and who, upon inspection, are deemed to be stowaways.

III. ANALYSIS

Facts

Recently, there has been an increase in the number of aliens arriving in the United States without travel documents of any kind. The airlines claim that the aliens destroy their travel documents en route to the United States. The Service has no way of determining whether the aliens boarded the aircraft abroad after establishing to airline personnel that they were in possession of valid travel documents. Consequently, the Service has adopted the practice of classifying such aliens as stowaways. Upon arrival in the United States, the aliens request asylum and are detained, usually in carrier custody, until the asylum application has been adjudicated.[FN1]

In December of 1989, the Service, through a policy memorandum, issued guidelines regarding the detention of aliens who arrive in the United States without any travel documentation. See INS Telegraphic Message, CO 235-C, "Stowaways on Commercial Airline Flights," dated December 19, 1989 (December 1989 Wire). The December 1989 Wire purported to set out the procedure for the detention of alien stowaways and the liability of airline carriers that transport such stowaways to the United States. Air carriers have complained about the large costs they now incur from the detention of such stowaways and have questioned the Service's authority to require payment of detention expenses for such aliens.

A. The Service May Not Classify Aliens as Stowaways Solely Because They Arrive in the United States Without Travel Documents

The term "stowaway" is not defined in the INA nor in its implementing regulations. Similarly, the legislative history of the INA and the Board of Immigration Appeals (BIA) decisions interpreting stowaway provisions fail to define the term. As used in the INA, the term "stowaway" suggests the common everyday meaning of the word. The common use of the term describes an individual who stows away. Webster's Dictionary defines a "stowaway" as, "a person who hides aboard a ship, airplane, etc. to get free passage, evade port officials, etc." Webster's New World Dictionary 1323 (3d ed. 1988) (emphasis supplied).

Case law also fails to clearly define the term "stowaway." Nevertheless, case law has shed some light on the meaning of the term. For example, when construing the meaning of a "passenger" under the Warsaw Convention on Commercial Aviation, one court stated that, "[o]ne must consider as an airplane passenger the person whom the carrier has engaged, by means of a contract of transportation, to carry from one place to another on an airplane. Thus, the stowaway could never be termed a passenger." Block v. Compagnie Nationale Air France, 386 F.2d 323, 332 n. 27 (5th Cir. 1967) (quoting Coquoz, Le droit prive' internationale Ae'rien 165 (Paris 1938)). More recently, the Fifth Circuit Court of Appeals suggested that, for a person to be a stowaway, the owner/operator of the transporting vessel must have no knowledge of the person's presence on board. Buchanan v. Stanships, Inc., 744 F.2d 1070, 1074–75 (5th Cir. 1984).

A definition of the term "stowaway" may be discerned from the provisions in 18 U.S.C. 2199, which make the act of stowing away on board a vessel or aircraft a criminal offense. That section provides a fine and/or imprisonment for

> [w]hoever, without the consent of the owner, charterer, master, or person in command of any vessel, or aircraft, with intent to obtain transportation, boards, enters, or secretes himself aboard such vessel or aircraft from a port, … airport, or other place within the jurisdiction of the United States; or
>
> Whoever, with like intent, having boarded, entered, or secreted himself aboard a vessel or aircraft at any place within or without the jurisdiction of the United States, remains aboard after the vessel or aircraft has left such place and is thereon at any place within the jurisdiction of the United States; or
>
> Whoever, with intent to obtain a ride or transportation, boards or enters any aircraft owned or operated by the United States without the consent of the person in command or other duly authorized officer or agent.

18 U.S.C. 2199 (emphasis supplied). The act of stowing away is completed by boarding, entering, or secreting oneself aboard a vessel or aircraft for the purpose of obtaining transportation without the consent of the owner or operator. The provision in 18 U.S.C. 2199 appears to include as a stowaway a person who boards or enters a vessel or aircraft with the consent of the owner, operator or person in charge, but who obtains transportation without such consent. Section 2199 of Title 18, United States Code, cross-references 8 U.S.C. sections 1182 (exclusion of stowaways) and 1323 (unlawful bringing of aliens to the United States). There exists no other definition of or reference to the term "stowaway" in the United States Code. In the absence of a definition of "stowaway" for immigration purposes, the common meaning of the term as well as the language found in the criminal statutory provisions are useful references for formulating a definition for the term "stowaway."

Applying these definitions to aliens who arrive in the United States on board commercial aircraft without any travel documentation, the following is evident. First, the aliens do board or enter the aircraft abroad. There is no indication, however, that they conceal their presence. On the contrary, the airlines claim that they have full knowledge of the presence of the aliens on board the aircraft from the beginning of the flight. Second, the intent of the aliens who board the aircraft is to obtain transportation to the United States. The airlines, however, claim that they consent to the transportation of the aliens to the United States after inspecting documents presented by the aliens as evidence of their admissibility to the United States. Therefore, the aliens obtain transportation with the consent of the owner or operator of the carrier. Consequently, aliens who arrive in the United States on commercial aircraft with no travel documentation fail to meet the criteria necessary to be classified as a stowaway. While they board the aircraft abroad with intent to obtain transport-

ation, they do so with the knowledge and consent of the owner or operator.

Additionally, there is indication in the INA that Congress intended to distinguish stowaways from other individuals who arrive in the United States without travel documents. Section 212(a) of the INA sets out the classes of excludable aliens. Stowaways are one such class. INA 212(a)(18), 8 U.S.C. 1182(a)(18). Another separate class of excludable aliens are immigrants who at the time of application for admission are not in possession of valid visas, passports or other travel documents required under the INA. INA 212(a)(20), 8 U.S.C. 1182(a)(20). Still another class of excludable aliens comprises nonimmigrants not in possession of valid travel documents. INA 212(a)(26), 8 U.S.C. 1182(a)(26). The fact that Congress distinguished stowaways from other aliens who arrive in the United States without any travel documents suggests that not all aliens who arrive in the United States without travel documentation arrive surreptitiously. Further, it is possible that a stowaway may arrive in the United States with travel documentation.

The mere fact that an alien has no travel documents upon arrival in the United States is insufficient to classify the alien as a stowaway. In the absence of some indication that the alien arrived in the United States through concealment on board the carrier and/or without the consent of the owner or operator of the aircraft, a finding that the alien is a stowaway is not proper.

B. Carriers Who Transport Stowaways to the United States are Liable for the Costs of Detaining Such Aliens

Section 237 of the INA provides that any alien who is excluded under the INA shall be immediately deported unless the Attorney General, in his discretion, deems the immediate deportation of the alien improper or not practicable. INA 237(a)(1), 8 U.S.C. 1227(a)(1). That section also states that, "the costs of the maintenance including detention expenses and expenses incident to detention of any such alien while he is being detained, shall be borne by the owner or owners of such vessel or aircraft on which he arrived." Id. Further, Section 237 provides that, "[i]t shall be unlawful for any master, commanding officer, purser, person in charge, agent, owner, or consignee of any vessel or aircraft … (4) to fail to pay the cost of [an alien's] maintenance while being detained as required by this section … . " INA 237(b)(4), 8 U.S.C. 1227(b)(4).

Aliens who are deemed to be stowaways upon their arrival and inspection in the United States are excludable under the INA. INA 212(a)(18), 8 U.S.C. 1182(a)(18). Alien stowaways who claim asylum in the United States are detained pending adjudication of their applications. As excludable aliens, stowaways fall within the provisions of Section 237 of the INA, which requires that their detention and maintenance expenses be paid by the carrier that transported them to the United States. See Medina v. O'Neil, 838 F.2d 800, 801 n.3 (5th Cir. 1988) (citing 8 U.S.C. 1227(a) for the proposition that a vessel is responsible for the detention expenses of a stowaway).

With the establishment of the user fee fund, provision was made to pay for the detention and deportation of excludable aliens out of the fees received in the "Immigration User Fee Account." INA 286(h)(2)(A)(v), 8 U.S.C. 1356(h)(2)(A)(v). The provisions for the detention and deportation of stowaways, however, were not affected by the user fee statute.[FN2] Stowaways are not covered under the user fee provisions because Section 273(d) of the INA requires that they remain in carrier custody. Further, Section 237(b), which makes carriers liable for the detention expenses of excludable aliens, remains in effect and was not affected by the user fee provisions.

Section 273(d) of the INA imposes a fine in the amount of $3,000, per violation, on any vessel or aircraft that "fails to detain on board or at such other place as may be designated by an immigration officer an alien stowaway until such stowaway has been inspected … or … after inspection if ordered to do so by an immigration officer … ." INA 273(d), 8 U.S.C. 1323(d), as amended by Immigration Act of 1990, Pub. L. No. 101- 649, 543(a)(10) (Nov. 29, 1990). This provision requires that an alien stowaway remain in the custody of the carrier that transported him or her to the United States. Section 273(d) also gives the Service authority to designate the location where the stowaway shall be detained. Designation of a detention facility for stowaways by the Service is discretionary. Medina v. O'Neil, 838 F.2d at 802.

Read together, the language of Section 237, requiring carriers to pay for the detention expenses of excludable aliens,

including stowaways, and the provisions in Section 273(d), place the liability for detention expenses of stowaways on the carriers that transport them to the United States. See General Counsel's Opinions 1985–1986, "Status of Alien Detention Costs - Carrier Custody" at 294, December 11, 1986. It should be emphasized that the authority to charge carriers for the detention expenses of stowaways appears to be in Section 237 and not in Section 273(d). Section 273(d) addresses the issues of carrier custody and imposition of fines. The fact that a stowaway who applies for asylum will be detained for a longer period of time than is normal for stowaways will not diminish the carrier's liability to pay the detention expenses.

1. The Service may designate a Service facility for the detention of stowaways without relieving the carrier of liability for detention expenses

The May 18, 1990 Wire instructed immigration officers to take six alien stowaways into Service custody without relieving the carrier of liability for their detention expenses. May 18, 1990 Wire at p. 2. While there is no express authority in the INA for the Service to take stowaways into custody, Section 273(d) permits the Service to designate a location for the detention of such aliens. There is nothing to prohibit the designation of a Service facility for such detention. Further, nothing in Section 273(d) of the INA suggests that the designation of a detention location by the Service relieves the carrier of liability for detention expenses. Consequently, we are of the opinion that the Service may designate a Service detention facility as the place of detention for stowaways without relieving the carrier of liability for detention expenses.

2. The current asylum regulations contradict the statutory provisions regarding carrier custody of stowaways

The final asylum regulations published on July 27, 1990 as they apply to stowaways, contradict the provisions of Section 273(d) of the INA. Section 253.1(f)(1) of the final asylum regulations provides that, an alien stowaway on a vessel or other conveyance who requests asylum "shall be promptly removed from the [vessel or other conveyance]. If the alien makes his fear known to an official while off such conveyance, he shall not be returned to the conveyance but shall be retained in or transferred to the custody of the Service." 55 Fed. Reg. 30673, 30687 (July 27, 1990), codified at 8 C.F.R. 253.1(f)(1). By requiring that an alien stowaway requesting asylum be "retained in or transferred to" Service custody, the new regulation contradicts the express requirement of Section 273(d) of the INA that alien stowaways remain in the custody of the carrier.

Similarly, Section 253.1(f)(3) provides that, pending adjudication of the asylum application, the stowaway asylum applicant "may be detained by the Service, or paroled into the custody of the ship's agent or otherwise paroled in accordance with 212.5 of this chapter … ." 55 Fed. Reg. 30673, 30687 (July 27, 1990), codified at 8 C.F.R. 253.1(f)(3). To the extent that this provision directs Service "custody" of alien stowaways, it may also contradict the language of Section 273(d) of the INA as regards carrier custody of stowaways. An agency's regulations must be consistent with statutory provisions. Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 (1948); 766 F.2d 520, 523 (Fed. Cir. 1985). Further, an agency's regulations cannot amend an act of Congress. Consequently, promulgation of a regulation that contradicts a statute is an ultra vires act and the regulation will be rendered void if it cannot be reconciled with the statute. See United States v. Vogel Fertilizer Co., 455 U.S. 16, 26 (1982); LaVallee Northside Civ. Ass'n v. Coastal Zone Mgt., 866 F.2d 616, 623 (3d Cir. 1989).

We recommend that CORAP take immediate steps to amend the language of the new regulations to make them conform to the statutory provisions. We suggest that 8 C.F.R. sections 253.1(f)(1) and (3) be amended to state that stowaway asylum applicants "shall be detained by the carrier pursuant to Section 273(d) of the INA, or otherwise paroled … ." This language would ensure that stowaways who express a fear of remaining in carrier custody could be detained in a neutral facility and the carrier would remain liable for the stowaway's detention expenses.

/s/ Paul W. Virtue

Acting

Genco Opinion 91-6

Legal Opinion: Jurisdiction of the OIG in INS investigations

Michael T. Lempres, Executive Commissioner

January 16, 1991

cc: G. H. Kleinknecht, Associate Commissioner for Enforcement, John F. Shaw, Assistant Commissioner, Investigations

I. QUESTION

You have requested a Legal Opinion as to the extent of the investigative jurisdiction of the Office of the Inspector General (OIG) in undercover operations conducted by the Immigration and Naturalization Service (Service), where there is no employee misconduct and no integrity issue.

II. CONCLUSION

The investigative authority of the Inspector General is generally limited to those situations where a Service employee is suspected of violating applicable standards of conduct. While the Inspector General may investigate the Service's conduct of investigations that are an integral part of Service programs, he may not conduct such investigations himself.

III. BACKGROUND

The Service presently notifies the Inspector General of any ongoing investigations which involve undercover agents posing as corrupt Service officials. Recently, the Inspector General has interpreted our notification procedure as a vehicle to participate in or control Service investigations. In particular, when given a courtesy notification of a joint undercover operation in Atlanta, the Office of Inspector General claimed jurisdiction, unilaterally set up meetings with DEA, and notified them of their intention to participate in the operation. There is also evidence that the Inspector General has initiated independent investigations to identify vendors of fraudulent INS documents, without concurrence of the Service.

In a letter to the INS District Director in Atlanta, dated November 17, 1990, Mr. J. Jerome Bullock, Regional Inspector General for Investigations, stated that because actual or attempted bribery of DOJ employees "constitutes serious corruption efforts involving Department programs, operations, and employees, the OIG maintains jurisdiction in such cases."

An unpublished order of the Attorney General, No. 1393-90, in addition to delegating investigative authority to the Inspector General in those situations involving integrity issues, grants investigative authority for "any fraud, waste and abuse with respect to the programs and operations of the Immigration and Naturalization Service." Apparently, Mr. Bullock feels that this language allows the Inspector General to intervene in undercover operations where Service agents pose as corrupt officials.

IV. ANALYSIS

The Department's Office of Legal Counsel (OLC) issued an opinion on March 9, 1989, that concluded that the IG of the Department of Labor lacked authority to conduct regulatory investigations that are an integral part of the programs

administered by that Department. That opinion considered the views of various Inspectors General, and was intended to have applicability beyond the Department of Labor. (See Opinion at Note 3) The OLC opinion is dispositive of the question raised herein.

The Inspector General Act of 1978 empowers the Inspectors General "to conduct, supervise, and coordinate audits and investigations relating to the programs and operations" of their respective agencies, 5 U.S.C. App. 4(a)(1). To interpret the meaning of the phrase "relating to the programs and operations", the OLC opinion examines the legislative history of the Act.

The legislative history clearly draws a distinction between an oversight role and a direct role in an agency's investigations. The legislative history indicates that the Inspectors General do not have the authority to conduct investigations that are an "integral part" of an agency's programs:

> While Inspectors General would have direct responsibility for conducting audits and investigations relating to the efficiency and economy of program operations and detection of fraud and abuse in such programs, they would not have such responsibility for audits and investigations constituting an integral part of the programs involved. Examples of this would be audits conducted by USDA's Packers and Stockyards Administration in the course of its regulation of livestock marketing and investigations conducted by the Department of Labor as a means of enforcing the Fair Labor Standards Act. In such cases, the Inspector General would have oversight rather than direct responsibility.
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> H.R. Rep. No. 584, 95th Cong., 1st Sess. 12–13 (1977).

The Inspector General Act was amended in 1988, to extend coverage to the Department of Justice, Pub. L. No. 100-504, 102 Stat. 2515 (1988). The House Report responded to concerns that extension of the Act would interfere with the Department's investigative functions:

> A simple extension of the 1978 act to include the Department of Justice would not result in a direct and significant distortion and diffusion of the Attorney General's responsibilities to investigate, prosecute, or to institute suit when necessary to uphold Federal law. The investigation and prosecution of suspected violations of Federal law and the conduct of litigation are parts of the basic mission or program functions of the Department of Justice. The 1978 act does not authorize inspectors general to engage in program functions and, in fact specifically prohibits the assignment of such responsibilities to an inspector general.
>
> H.R. rep. No. 100-771, 100th Cong., 2d Sess. 9 (1988) (emphasis added).

The OLC opinion concludes that "the legislative history and structure of the Act provides compelling evidence that in granting the Inspector General authority to 'conduct and supervise audits and investigations relating to programs and operations' of the Department, 5 U.S.C. App. 2(1), Congress did not intend to grant the Inspector General authority to conduct, in the words of the House Report, 'investigations constituting an integral part of the programs involved.' Rather, the Inspector General's authority with respect to investigations [is] one of 'oversight'." (Opinion at 11)

If you have any questions concerning this matter, please contact William P. Joyce or Fred Tournay of this office at 514-2895.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-7

Legal Opinion: Whether present viability of a marriage is a factor in adjudicating an I-751

John Schroeder, Assistant Commissioner, Adjudications, Ronald LaFevre, District Counsel, San Francisco

CO 216

January 25, 1991

QUESTION

The question has been raised in a case filed in the San Francisco office whether the present viability of a marriage may be the sole factor for denial of an I-751 petition to remove the conditional resident status of an alien. In the case, the United States citizen wife and the alien spouse had filed the petition jointly, but in the interview they revealed that they were not sure about the future of the marriage because of philosophical differences as to the wife's role in the marriage. It does not appear that the marriage was a sham at its inception and it has not been terminated.

CONCLUSION

The present viability of a marriage is not an issue in adjudicating an I-751 petition.

ANALYSIS

Under Section 216(d)(1)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. 1186a(d)(1)(A), as amended by the Immigration Marriage Fraud Amendments of 1986 (IMFA) (Pub. L. 99-639), a petition to remove the conditional resident status of an alien must demonstrate that

> (i) the qualifying marriage (I) was entered into in accordance with the laws of the place where the marriage took place, (II) has not been judicially annulled or terminated, other than through the death of a spouse, and (III) was not entered into for the purpose of procuring an alien's entry as an immigrant; and (ii) no fee or other consideration was given (other than a fee or other consideration to an attorney for assistance in preparation of a lawful petition) for the filing of a petition underSection 204(a) or 214(d) with respect to the alien spouse or alien son or daughter.

These provisions are also set forth at 8 C.F.R. 216.4(c), on adjudication of an I-751 petition.

The IMFA is concerned with the purposes and conditions under which the marriage was undertaken. The legislative history indicates that the purpose of the IMFA is to "Authorize the Attorney General to revoke conditional status and commence deportation if he determines that the marriage was entered into for pay (or other consideration) or to evade the immigration laws or had been judicially terminated." H.Rep. No. 906, 99th Cong. 2nd Sess. 7 (1986). [Emphasis added.] In creating the IMFA, Congress did not concern itself with the present viability of a marriage. The present viability of a marriage is not one of the factors which the INA, as amended by the IMFA, lists as a consideration in adjudicating the I-751 petition.

The argument has been raised that viability should be considered where the possibility exists that the marriage is being continued, or divorce has not been sought, in order to file the petition. This argument would make applicable to an I-751 petition the rationale set forth in Matter of Aldecoaotalora, 18 I&N Dec. 430 (BIA 1983), where a second preference petition was denied because the beneficiary had obtained a divorce solely to enter as an unmarried daughter.

However, Aldecoaotalora is distinguishable from the matter at hand, because the divorce was a sham at its inception and the sole purpose was to obtain immigration benefits. The fraud provisions of the IMFA go only to the reasons for entering the marriage, not to the continuation, or viability, of the marriage.

Accordingly, it is the view of this Office that the present viability of the marriage may not be the basis for denial of an I-751 petition.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-8

Legal Opinion: petitions by Temporary Residents under Section 112 of the 1990 Act

James A. Puleo, Associate Commissioner, Examinations

CO 1588-C

January 28, 1991

I. QUESTION

You have asked whether under Section 112 of the Immigration Act of 1990, an alien who is a temporary resident alien may file a relative petition.

II. SUMMARY CONCLUSION

An alien who is a temporary resident alien is not eligible to file a relative petition under Section 112.

III. ANALYSIS

Under Section 112 of the Immigration Act of 1990, in addition to any immigrant visa numbers otherwise available, 55,000 visa numbers (after an offset) are available in each of fiscal years 1992, 1993, and 1994 for spouses and children of "eligible, legalized aliens."

A "legalized alien" is defined as an alien who was provided (1) temporary or permanent residence status as a special agricultural worker (SAW) under Section 210 of the Immigration and Nationality Act (INA); (2) temporary or permanent residence status under Section 245A of the INA; or (3) permanent residence status as a Cuban/Haitian entrant under Section 202 of the Immigration Reform and Control Act of 1986 (IRCA).

At first impression, Section 112 would appear to allow aliens in temporary resident status, pursuant to sections 245A and 210 of the Immigration and Nationality Act (Act), to file immigrant visa petitions for qualified spouses and children. However, under Section 112(a)(1), immigrant visa numbers are available only to eligible legalized aliens. It is a canon of statutory interpretation "to give effect, if possible, to every clause and word of a statute." United States v. Menasche, 348 U.S. 528, 539 (1955). Thus, only an eligible legalized alien may file a petition under Section 112.

Under Section 112(b), such a petition must be filed in accordance with the provisions of Section 203(a)(2) and Section 204 of the Act. Section 204(a)(1)(B) provides that a Section 203(a)(2) petition may only be filed by an alien lawfully admitted for permanent residence. Accordingly, an alien who is still in temporary resident status is not eligible to file for a visa number available under Section 112 of the 1990 Act, but must wait until he or she has been accorded lawful permanent residence status.

/s/ Paul W. Virtue

Acting

Genco Opinion 91-9

Legal Opinion Regarding State Plan Implementation under IMMACT 507 and Alternatives to Production of a Certified Copy of Conviction

Criminal Alien Field Advisory Committee c/o Greg Bednardz, cc Michael T. Lempres

February 1, 1991

ISSUES

I. What are the requirements for state plans under IMMACT 507.

II. In immigration proceedings, what are the acceptable alternatives for introduction of (state or local) criminal convictions where production of a certified copy of conviction is not possible.

CONCLUSION

I. State courts must provide certified copies of records of conviction to INS without fee within thirty days after an alien's final conviction.

II. 8 C.F.R. 287.6 requires for admissibility purposes a certified copy of the criminal conviction that is attested by the custodian of the original record or by an authorized deputy. However, there are several alternatives to this approach which may be feasible. Some of the alternatives require amendment to the regulation and may be susceptible to legal challenge.

I. ANALYSIS FOR STATE PLAN REQUIREMENTS

Section 507 of the Immigration Act of 1990 (IMMACT), P.L. 101-649, 104 stat. 4978 et seq., November 29, 1990 requires states to provide "without fee to the Immigration and Naturalization Service, within 30 days of their conviction, the certified records of conviction of aliens who have been convicted of violating the criminal laws of the State." The IMMACT provides sanctions against states in the form of loss of certain federal funds, if they fail to provide "an assurance that the State has established a plan" for making such certified records of conviction available to INS.

The Board of Immigration Appeals has mandated a three-pronged test for establishing a conviction for immigration purposes. See Matter of Ozkok, Interim Decision #3044 (BIA 1988): (l) the respondent must plead or be found "guilty" by the sentencing court; (2) the judge must order some form of punishment, to wit: confinement, suspended sentence, probation, fine, etc. and 3) no terms of the judgment permit further proceedings to review the issue of guilt.

The Board reiterated the principle that whether a conviction exists for purposes of a federal statute is a question of federal law and should not depend on the "vagaries" of state law. Matter of Ozkok, supra. See, Matter of A-F-, 8 I&N Dec. 429 (BIA, A.G. 1959). The finality of a conviction is not affected by the pendency of post conviction discretionary petitions, collateral attacks and/or remedies not constituting a direct appeal of right.

The Service may not use a certified conviction for immigration purposes, e.g. as a basis for exclusion or deportation of an alien from the United States, unless the conviction is final in accordance with the uniform standard required by the Board of Immigration Appeals. Thus, the IMMACT provision, which is intended to facilitate the deportation of criminal

aliens, means that the conviction record should be supplied to the Service within 30 days of the final conviction, (i.e. direct appeal of right is waived, the time period has lapsed, or the appeal has been concluded).

The IMMACT provision requires making available "the certified records of conviction" to the Service. This would include the indictment, complaint and conviction, at a minimum. What constitutes "records of conviction", other than the conviction itself, would be governed by state law, and might vary. The certified final conviction itself and criminal charge, however, should be supplied in all cases, within 30 days of the final conviction.

II. ANALYSIS OF CERTIFICATION REQUIREMENT

The certification approach contemplated under current regulations is a direct certification by the Clerk of Court. Alternatively, there are two approaches to obtaining conviction records that would not require amendment of the regulations. Both of these authentication methods require that the Clerk of the Court deputize the designated INS officer as his agent. The deputized INS officer goes to the clerk's office, is handed the original file, duplicates the conviction information, seals and certifies the document, and then returns the file to the clerk. In the second method of authentication, the deputized INS officer could receive the criminal conviction document on a personal computer which is hooked up to a dedicated line with the court.[FN1] Upon receipt of the conviction record, the INS officer seals and certifies the document.

Under theses procedures, the INS officer has been properly deputized by the Clerk of the Court and authorized to attest to the authenticity of the criminal conviction. Where the integrity of the duplication and transmission process has been adequately preserved, successful challenges should be minimal. To prevent prejudice and to ensure fundamental fairness, however, where the alien raises a bona fide challenge to the accuracy of the document, the court certification of authenticity should be produced.

One alternative that may be considered is the production of photo copies of criminal convictions, accompanied by an INS officer's affidavit of authenticity. This approach, however, poses potential practical problems and an increased risk of successful legal challenge. There are various factors that should be considered in determining the practicality of adopting this approach.

Currently, 8 C.F.R. 287.6 requires that admission of domestic criminal convictions be by official publication or by certification of the custodian of the record, or his authorized deputy. This standard for the admissibility of these records is more restrictive than is required under the Federal Rules of Evidence. Rule 1005, Fed. R. Evid., allows certification by copy or testified to be correct by a witness who has compared it with the original. If reasonable diligence fails to produce the record, in accord with these requirements, the rule allows submission of other evidence of the contents.

The Federal Rules can be utilized as a model for modification of the regulations, even though the law does not require that proceedings under the Act comport with federal rules of evidence.[FN2]Tisi v. Tod, 264 U.S. 131, 44 S. Ct. 260, 68 L. Ed. 590 (1924); Pang v. INS, 368 F.2d 637, 639 (3rd Cir. 1966), cert. denied, 386 U.S. 1037 (1967); Dallo v. INS, 765 F.2d 581, 586 (6th Cir. 1985).

The Board and reviewing courts have consistently required that introduction of copies of official records in immigration proceedings be accompanied by proper authentication. Matter of Kumar, Interim Decision #2997 (BIA 1985); Matter of Oduro, 18 I&N Dec. 421 (BIA 1983); Matter of Perez-Valle, 17 I&N Dec. 581 (BIA 1980); Matter of Gutnick, 13 I&N 412 (BIA 1969); Iran v. INS, 656 F.2d 469 (9th Cir. 1985); U.S. v. Perlmuter, 693 F.2d 1290 (9th Cir. 1982); Longoria-Castenda v. INS, 548 F.2d 233 (8th Cir. 1977).[FN3]

Some courts have permitted alternative methods of authentication and have held that 8 C.F.R. 287.6 represents only one acceptable method of authenticating a copy of an official record in immigration proceedings. Iran v. INS, supra; Longoria-Castenda v. INS, supra; Hoonsilapa v. INS, 575 F.2d 735 (9th Cir. 1978).

Any relaxation of the regulation applicable to criminal conviction records may require the personal appearance of the INS officer at the immigration hearing to allow the opportunity for cross-examination of his testimony on the issue of au-

thentication.

As indicated, allowing the officer to certify by affidavit that he has examined the original document and compared it to the copy offered as an exhibit before the immigration court, would require amendment of the regulation. The regulations contain several provisions regarding admission of documents which utilize this approach. 8 C.F.R. 103.2(b)(1) provides that documents supporting applications and petitions must be originals unless "the accuracy of the copy has been certified by an immigration or consular officer who has examined the original." Sections 204.2(j), 212.8(b), and 214.2(h)(6) permit an attorney or accredited representative to certify copies of documents as authentic, (the INS retains the right to examine the originals, upon request).

Since proceedings under the INA are not subject to the Federal Rules of Evidence, nor to the Administrative Procedure Act (APA), this course of action is permissible legally. Matter of Anselmo, Interim Decision #3105 (BIA 1989). Section 242(b) of the Act, 8 U.S.C. 1252(b), requires only that evidence received in immigration proceedings be "reasonable, substantial, and probative".

There are two criteria for assessing evidence: whether it has probative value and whether its introduction is consistent with a fair hearing. Vajtauer v. Commissioner, 273 U.S. 103, 47 S.Ct. 302, 71 L. Ed. 560 (1927); Morgano v. Pilliod, 299 F.2d 217 (7th Cir. 1962), cert. denied, 370 U.S. 924; Hoonsilapa, supra; Baliza v. INS, 696 F.2d 1241 (9th Cir. 1981), modified, 709 F.2d 1231 (9th Cir. 1983).

Obviously, the introduction of a criminal conviction, certified by the immigration officer, has probative value in an immigration hearing, and absent challenge as to the competence/integrity of the officer, or other reason to question the accuracy of the copy, there is no "per se" unfairness to this method of certification.

CONCLUSION

The state judiciary should facilitate the certification process either through its own employees or through deputized INS employees, to satisfy the duty imposed on the States by IMMACT. If the State has a mechanism for electronically created certified final convictions, this procedure should satisfy the certification requirement, if it satisfies state law certification requirements.

This office will work closely with you to develop any proposed modification to our present regulations to simplify our existing process.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-10

Legal Opinion concerning Employer Sanctions Laws as they relate to Miscellaneous Foreign Government Offices

Jack Tabaka, Senior Immigration Examiner, COADN

CO 274A

February 4, 1991

The Office of the General Counsel has been asked by the Office of Examinations, Adjudications Branch, to determine whether the employer sanctions provisions of Section 274A of the Immigration and Nationality Act (the Act) apply to "miscellaneous foreign government offices." This memorandum represents the opinion of the Office of the General

Counsel.

I. ISSUE

Do the employer sanctions provisions found in Section 274A of the Act apply to "miscellaneous foreign government offices"?

II. SUMMARY CONCLUSION

The employer sanctions provisions of Section 274A of the Act apply to affect "miscellaneous foreign government offices" in their employment of certain individuals where an activity of that office is essentially commercial in nature.

III. LEGAL ANALYSIS

Section 274A of the Act makes it unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien; or, to hire for employment in the United States an individual without complying with the employment verification requirements. Section 274A(a)(1)(A) and (B); 8 U.S.C. 1324a(a)(1)(A) and (B).

The first issue that must be addressed is whether Section 274A of the Act applies to miscellaneous foreign government offices as employers or whether such offices enjoy some kind of immunity from the jurisdiction of federal and state courts in the United States.

Sections 1602 through 1607 of Title 28 of the U.S. Code speak to this jurisdictional issue. Section 1604 states that "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 and 1607 of this chapter." 28 U.S.C. 1604 (Foreign Sovereign Immunities Act of 1976).

A "foreign state" includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state. 28 U.S.C. 1603. An "agency or instrumentality of a foreign state" means any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (d) of this title, nor created under the laws of any third country. 28 U.S.C. 1603.

In light of this statute, it appears that a miscellaneous foreign government office would fall within the definition of "foreign state" and would be entitled to immunity from the jurisdiction of federal and state courts in the United States except as provided in 28 U.S.C. 1605 and 1607. The Department of State notes several examples of such immunity for miscellaneous foreign government offices in its Draft Note: Miscellaneous Government Offices (October 15, 1990) (hereinafter referred to as Draft Note), e.g., exemptions from federal taxation (not including income earned from a "commercial activity"), employer withholding of income tax and social security for American citizen employees, and the requirement to register with the United States Department of Justice under the Foreign Agents Registration Act of 1938. See Draft Note.

The second issue that must be addressed concerns the exceptions set forth in 28 U.S.C. 1605 and 1607 and whether miscellaneous foreign government offices fall within one of these exceptions.[FN1] Section 1605(a) states, in pertinent part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case … (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state

elsewhere and that act causes a direct effect in the United States … ."

28 U.S.C. 1605(a)(2).

"Commercial activity" is defined as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d). See also Meadows v. Dominican Republic, 817 F.2d 517 (9th Cir. 1987), stay denied, 484 U.S. 951 (1987), cert. denied, 484 U.S. 976 (1987) (efforts to obtain loan for Dominican Republic housing project constituted commercial activity having a direct effect in United States for which immunity was unavailable); Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543 (D.C. Cir. 1987) (contract between Bolivia and plaintiff corporation for designing and implementing plan for development of Bolivia's rural areas fell within commercial activity exception to Foreign Sovereign Immunities Act); Wolf v. Banco Nacional de Mexico, S.A., 739 F.2d 1458 (9th Cir 1984), cert. denied, 469 U.S. 1108 (1985) (Mexican bank's sale of certificate of deposit to United States resident was a commercial activity carried on in the United States within the meaning of commercial activity exception).

This concept of commercial activity is reflected in the Department of State's Draft Note:

> Where a foreign government office is essentially engaged in commercial or competitive activities, or activities which by the United States standards would not be considered governmental functions, such as political-party, labor-union, religious, news-gathering, entertainment, or educational activities, the Department of State will not recognize such office as an official government office, or the employee thereof as a miscellaneous foreign government employee, regardless of the employee's status with the sending state."

See Draft Note, p.2.

The United States Court of Appeals for the District of Columbia noted this concept of commercial activity as a basis for the restrictive immunity doctrine in Broadbent v. Organization of American States, 628 F.2d 27 (D.C. Cir. 1980). In Broadbent, the court held that an international organization was shielded under the restrictive immunity formula from a lawsuit by its employees where the relationship between the organization and its internal administrative staff was noncommercial. Id. The court turned to the legislative history in its endeavor to define "commercial activity." The House Report noted, in pertinent part:

> (d) Commercial activity.— Paragraph (c) of Section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. …

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign governmental to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function … .

Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

Broadbent, 628 F.2d at 34 (citing H. Rep. No. 94-1487, 94th Cong., 2d Sess. 16 (1976)) (emphasis added).

The third issue that must be addressed is whether a foreign state can claim immunity from the jurisdiction of administrative law tribunals, such as those which adjudicate employer sanctions cases. Section 1604 of Title 28 of the U.S.

Code states, in pertinent part, that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States … ." 28 U.S.C. 1604 (emphasis added). The question here becomes whether administrative law tribunals are considered to be "courts of the United States" or "of the States" within the meaning of this section. The plain meaning of the statute provides no guidance on this issue and the case law is silent in this regard. However, the doctrine of sovereign immunity is one of international law under which domestic courts, given the proper circumstances, will relinquish jurisdiction over a foreign state. Jet Line Services, Inc. v. M/V Marsa El Hariga et al, 462 F.Supp. 1165 (D. Md. 1978) (emphasis added); see generally N.E. Leech, C.T. Oliver, J.M. Sweeney, The International Legal System 306-91 (1973). Although no case law exists which is directly on point concerning this issue, it is reasonable to deduce from a general reading of the statute and the existing case law that administrative law tribunals are domestic courts, and that their jurisdiction would also be subject to the invocation of the sovereign immunity doctrine.

Even if a foreign state cannot raise the issue of immunity during administrative proceedings, it is possible that a foreign state could raise this issue in federal district court prior to an adjudication by an administrative law judge on the merits of the case. In Association of National Advertisers, Inc., et al. v. Federal Trade Commission, et al, 627 F.2d 1151, (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980), the United States Court of Appeals for the District of Columbia held that "[i]n rare circumstances, … extraordinary prejudgment claims prior to final agency action [have been considered]." Id. at 1156. Therefore, a foreign state might still be able to raise the immunity issue in federal district court, if not in an administrative law tribunal.

In light of the statutory law and caselaw, it appears that a miscellaneous foreign government office could be subject to administrative proceedings pursuant to the employer sanctions laws in situations where the employer-employee relationship involves a commercial activity or transaction, and/or when the miscellaneous foreign government office employs an American citizen or a national of a third country. When the miscellaneous foreign government office employs individuals who are diplomatic, civil service, or military personnel, or who are working in the United States on official non-commercial business for their governments, the office would not be subject to the employer sanctions laws of the United States.

The final issue becomes the extent of liability to which a foreign state can be held. Section 1606 of Title 28 states, in pertinent part:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under Section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages … .

28 U.S.C. 1608.

Therefore, it appears that a miscellaneous foreign government office could be subject to the same civil monetary penalty, as well as a cease and desist order, as a private employer under similar circumstances.

We hope this opinion will be helpful in your work with the Department of State.

/s/ Paul W. Virtue

Acting

Genco Opinion 91-11

Legal Opinion in Response to Request for Clarification of Reverification Requirements

William B. Odencrantz, Regional Counsel, Western Region

CO 274A

February 4, 1991

The Office of the General Counsel has been asked by the Office of the Regional Counsel, Western Region, to respond to a request for clarification of the reverification requirements contained in 8 C.F.R. 274a.2(b)(1)(vii). This memorandum represents the opinion of the Office of the General Counsel.

I. ISSUE

When an employee's work authorization expires, or when an employer is notified that a work authorization document presented by an employee is insufficient to establish work authorization, can the employer require that the employee present an INS-issued document which shows a continuing grant of work authorization or is a new grant of work authorization?

II. SUMMARY CONCLUSION

Since the Immigration Act of 1990 makes it unlawful for an employer to request more or different documents or to refuse to honor documents which on their face appear to be genuine for the purposes of satisfying the employment eligibility verification requirements, an employer cannot require the employee to present an INS-issued document in order to prove work eligibility.

III. LEGAL ANALYSIS

The Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA) and the Immigration Act of 1990 (the Act), makes it unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien; or, to hire for employment in the United States an individual without complying with the employment verification requirements. Section 274A(a)(1)(A) and (B); 8 U.S.C. 1324a(a)(1)(A) and (B). It also makes it unlawful for an employer to request more or different documents or to refuse to honor documents which on their face reasonably appear to be genuine for the purposes of satisfying the employment eligibility verification requirements of Section 274A(b) of the Act. To do so may be an unfair immigration-related employment practice. 8 U.S.C. 1324b(a)(6).

These two sections of the Act may, in practice, appear to conflict with one another in certain situations. Such a situation might be where an employee's work authorization expires and he then presents a social security card as evidence of employment eligibility. 8 C.F.R. 274a.2(b)(1)(vii) states in pertinent part:

> If an individual's employment authorization expires, … the employer, recruiter, or referrer for a fee must complete a new Form I-9 … . In completing the new Form I-9, the employee or referred individual must present a document that either shows continuing employment eligibility or is a new grant of work authorization. The employer or the recruiter or referrer for a fee must review this document and, if it appears to be genuine and to relate to the individual, note the document's identification number and expiration date on the new Form I-9.

8 C.F.R. 274a.2(b)(1)(vii).

In the situation described above, an employer cannot require that an employee present an INS-issued document in order to prove continuing authorization to work. If that employee presented a valid social security card as evidence of his authorization to work, the employer would have to accept this document as a List C document. It should also be noted here that the Immigration Act of 1990 makes it unlawful for any person or entity to accept or receive any document law-

fully issued to a person other than the possessor (including a deceased individual) for the purpose of complying with Section 274a(b). Immigration Act of 1990, Public Law No. 101-649, Nov. 29, 1990, 104 Stat. 4978 et seq.; Section 274C of the Act.

Regarding the issue which San Francisco District Counsel Ronald Le Fevre raised concerning the authority of the regulations to require reverification of employment eligibility, the Office of the General Counsel agrees with your position that such authority can be implied through the fact that Congress was aware that situations would arise where employment authorization would expire for aliens who were entitled to extensions or other forms of authorization. If regulations were not issued to cover these situations, then the purpose of IRCA to require that only aliens lawfully authorized to work in the American labor market would be frustrated.

I hope this opinion is helpful to you and the San Francisco District Counsel's office.

/s/ Paul W. Virtue

Acting

Genco Opinion 91-12

Use of Form G-28 by the National Fines Office

G. Thomas Graber, Director, National Fines Office

CO 280

February 5, 1991

I. QUESTIONS PRESENTED

Is the National Fines Office (NFO) obliged to require the filing of a G-28 [Notice of Entry of Appearance By Attorney or Representative] by those representing carriers in administrative fine proceedings initiated by the NFO.

If so, at which point would the G-28 be required to preclude denial of information to the requestor.

If not, to whom is the NFO obliged to respond telephonically or in writing as to the contents of a fine proceeding when so requested by any attorney or other representatives claiming representation of a carrier against whom fine proceedings have been initiated.

II. SUMMARY CONCLUSIONS

The National Fines Office (NFO) is obliged to require the filing of a Form G-28 by those representing carriers in administrative fine proceedings initiated by the NFO.

The G-28 must be filed with the NFO by the representative as soon as the representative becomes involved in the case, and the representative is not entitled to information about the case until the G-28 is filed with the NFO.

III. DISCUSSION

INS regulation 8 C.F.R. 292.4(a) states that an appearance shall be filed on the appropriate form by the attorney or representative appearing in each case before the Service. INS regulation 8 C.F.R. 299.1 states that Form G-28 (Notice of Entry of Appearance as Attorney or Representative) is the appropriate form to use to file said appearance. The National

Fines Office comes under the authority of the Service's Associate Commissioner for Examinations, per 8 C.F.R. 100.2(c)(3).

Thus, per the above regulations, the NFO is obliged to require the filing of a G-28 by a representative in a case before the NFO. The use of the word "shall" in 8 C.F.R. 292.4(a) makes the use of the G-28 mandatory for the NFO. See also Gordon and Mailman, Immigration Law and Procedure, 4.02[2], which states: "An attorney or representative appearing in any individual case files a notice of appearance on Form G-28." (Emphasis added.)

Having determined that G-28 is necessary, the NFO asks when it is required "to preclude denial of information to the requestor." INS regulation 8 C.F.R. 292.4(b) discusses availability of records, and states in essence that records may be accessed by the party involved, or his attorney or representative. Thus, a "requestor" is not entitled to any information about a case until said requestor becomes the attorney or representative for the party involved, and the only way to become the attorney or representative is to file a G-28. Accordingly, NFO should obtain a G-28 as soon as the attorney or representative becomes involved in the case, and NFO should not divulge any information to an attorney or representative until the G-28 is filed with NFO.

For further information, please contact Assistant General Counsel Robert Egan at 514-1260.

/s/ Paul W. Virtue for WILLIAM P. COOK

General Counsel

Genco Opinion 91-13

Section 504 of the Immigration Act of 1990 - Exclusion of Aggravated Felons

G. H. Kleinknecht, Associate Commissioner, Enforcement

February 5, 1991

QUESTION

You have requested a Legal Opinion concerning the scope of Section 236(e) of the Immigration and Nationality Act, as amended (Act). This section requires aliens in exclusion proceedings who have been convicted of aggravated felonies, to be taken into custody upon completion of the alien's sentence.

SUMMARY CONCLUSION

The custody requirements in Section 236(e) of the Act are applicable to aliens in exclusion proceedings who have been convicted of an aggravated felony and released from custody in the United States. These aliens become subject to Section 236(e) "upon completion of the aliens sentence for such conviction."

ANALYSIS

I. BACKGROUND

Section 504 of the Immigration Act of 1990 (IMMACT) amended Section 236 of the Act, effective November 29, 1990, by adding a new subsection 236(e). Section 236(e)(1) of the Act requires the Service to take into custody any alien convicted of an aggravated felony (aggravated felon) upon completion of the alien's sentence, pending a determination of

excludability.

Prior to the enactment of Section 236(e) of the Act, aliens in exclusion proceedings were already subject to mandatory detention pursuant to Section 235(b) of the Act. However, there was no expressed statutory mandatory detention for excludable aliens who were in the United States, i.e., parolees, who had been convicted of aggravated felonies and released to Service custody.

II. STATUTORY CONSTRUCTION

The mandatory custody requirement under Section 236(e)(1) of the Act mirrors the mandatory custody requirement under former Section 242(a)(2) of the Act, enacted by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 (effective Nov. 18, 1988), and amended by Section 504 of IMMACT to clarify the circumstances triggering the custody requirement under Section 242(a)(2). Former Section 242(a)(2) mandated custody of any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction, pending a determination of deportability. Under the current Section 242(a)(2), the Service is required to take into custody any aggravated felon, pending a determination of deportability, upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). This amendment was intended to resolve the issue of when an aggravated felon was subject to detention under former Section 242(a)(2) of the Act, i.e., whether the release on parole of an aggravated felon was a completion of sentence.

The mandatory detention requirements for aggravated felons reflect Congress' determination that these criminal aliens pose a threat to the safety and welfare of our society and that they present a risk of absconding. However an aggravated felon alien denied admission to the United States, would not pose such a threat or risk, since the alien would not be released into the United States. Arriving aliens are placed in exclusion proceedings by the Service and are subject to detention in Service custody under Section 235(b) of the Act or release on parole under Section 212(d)(5) of the Act "for emergent reasons or for reasons deemed strictly in the public interest." The decision to parole depends on whether the alien is dangerous or poses a risk to security or public interest or is likely to abscond. 8 C.F.R. 235.3. The parole authority under Section 212(d)(5) of the Act has been recognized as available to aliens in exclusion proceedings, notwithstanding the detention provision in Section 235(b) of the Act. Jean v. Nelson, 472 U.S. 846, 855 (1985). However, an aggravated felon by definition should not be eligible for parole.

As an offshoot of the exercise of parole authority in exclusion proceedings, the Service developed an administrative practice of releasing aliens back to a contiguous country in exclusion proceedings commenced at land border ports of entry. The practice evolved as a means of avoiding needless confinement in Service custody in those land border exclusion cases in which the alien was not paroled into the United States pending a determination of excludability. This practice, acknowledged in Operations Instruction OI 235.6a, has permitted the Service to pursue exclusion proceedings that would otherwise have been deemed unavailable for lack of adequate detention and hearing resources. The release of such aliens back to the contiguous country pending a determination of excludability also would not pose a threat to the safety and welfare of the United States nor would there be concern with the alien absconding outside of the United States.

III. CONCLUSION

The custody requirements in Section 236(e) of the Act are applicable to all aggravated felons released from custody in the United States pending the disposition of the exclusion proceedings. Section 236(e) is not applicable to aliens applying for admission to the United States at the port of entry and does not preclude either a parole into the United States or the release to a contiguous country of an aggravated felon seeking entry into the United States. However, such aggravated felons in exclusion proceedings are subject to the requirements of Section 235 of the Act and should be deemed ineligible for parole. As described above, the release of an aggravated felon to a contiguous country would not undermine the legislative intent of the mandatory detention requirement for aggravated felons nor hamper the ability of the Service

to secure a final order of exclusion for such aliens.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-14

Payment of Medical Bills for Aliens Injured During Pursuit by Border Patrol Agents

Ben Davidian, Regional Commissioner, Western Region

CO 659-C

February 10, 1991

I. QUESTION

Must the Immigration and Naturalization Service (INS) take into custody those aliens injured while fleeing from Border Patrol Agents, and thereby incur responsibility for payment of their medical bills?

II. SUMMARY

No. INS is under no legal obligation to take into custody, and thereby incur responsibility for, the medical bills of aliens injured (e.g., in automobile accidents) while fleeing from Border Patrol Agents.

III. ANALYSIS

INS clearly has a duty to pay the medical bills of aliens injured while they are in INS custody. However, aliens who are fleeing from Border Patrol Agents generally have not yet come into custody.[FN1] Until Border Patrol Agents (or other INS personnel) take an alien into custody, there is no obligation to pay medical bills resulting from injuries they may suffer, even if those injuries result from seeking to avoid the pursuit of INS personnel.

This principle was applied on December 28, 1990, by a federal appeals court in California. Overturning a U.S. Claims Court decision, the appeals court ruled that INS was not obligated to pay the medical bills of 14 aliens injured in an automobile accident which occurred during pursuit by Border Patrol Agents. The injured aliens were never in the custody of INS, and INS had no care-providing duties to perform in meeting their medical needs.[FN2]

No one questions the general principle that, as law enforcement officers, Border Patrol officers have a moral obligation to aid the injured. The decision of whether to take those injured as a result of flight from law enforcement officers into custody is, however, a matter of policy. This policy differs from jurisdiction to jurisdiction, and from agency to agency. Within INS, the Commissioner establishes policy in accordance with applicable law and regulation.

Within INS, the Commissioner has stated that Border Patrol Agents will not take aliens injured at the scene of an accident into custody. See letter dated October 25, 1990. (Attachment A) The California Highway Patrol follows an identical policy.

Should you require additional information in this area, or should you have a question regarding a particular scenario, please contact Sandra B. March, Assistant General Counsel, of this office at FTS 368-1260.

/s/ Paul W. Virtue

Acting
Attachments

Genco Opinion 91-15

Alien Crewmen - Whether performance of line handling functions by alien crewmen constitutes a violation of crewman status under the INA

Office of the Regional Commissioner

Office of the Northern Region

CO 235-C

CO 214d-C

February 12, 1991

Attention: Michael Hrinyak, Assistant Regional Commissioner, Inspections

I. QUESTION PRESENTED

You have requested an opinion as to whether alien crew members of Canadian flagged vessels may tie, cast off, and handle mooring lines of such vessels docked on the Great Lakes at the piers of Burns International Harbor, Port of Indiana without violating their crewman status.

II. SUMMARY CONCLUSION

The Immigration and Nationality Act (INA or Act) is silent on the question of who may perform line handling functions in United States ports. Presently, the INA does not expressly preclude alien crewmen from performing the line handling functions for the vessel on which they serve. There is some indication, nevertheless, that line handling is a longshore function which properly should be performed by longshoremen. However, the policy of the Immigration and Naturalization Service (INS or Service) has been to permit alien crewmen to perform the line handling in certain limited circumstances.

III. FACTUAL BACKGROUND[FN1]

This case arises in the context of a strike by Local 1969 of the International Longshoremen's Association, Great Lakes District, AFL-CIO (Union) against Rogers Terminal & Shipping, a division of Cargill Marine & Terminals, Inc., and against American Grain Trimmers, Inc., two stevedoring companies (Employers) at Burns International Harbor, Port of Indiana (the Port). The Employers have provided stevedoring services to Cargill, Inc. since 1981. The stevedoring services include lines handling (the tying up and letting go of mooring lines on the dock), and the loading and discharging

of bulk grain cargo to and from barges and ships. The Employers provide competing stevedoring services for three types of vessels that transport grain on the Great Lakes: barges (which are not relevant to the issue in this case); Canadian registered lake vessels (commonly referred to as "Canadian Lakers"); and foreign registered ocean-going vessels (commonly referred to as "salties").

The current collective bargaining agreement (which is the fourth one between the Union and the Employers) expired on December 31, 1989. On or about August 4, 1990, the Union and the Employers reached an impasse in negotiations for a new collective agreement. The impasse was based upon the Union's objection to and the Employer's insistence upon retention of the exception language to Section 17.1 of the expired agreement. That section stated:

> LINESMEN
>
> 17.1 SCOPE: The lines of all vessels in the ocean, overseas trade which tie up or let go at any dock of the elevator and/or Company for whose loading, discharging, cleaning or other services, the Elevator or Company has contracted shall be handled by members of the collective bargaining unit on terms and conditions set forth below. The Employers agree that they shall adhere to and follow all Department of Immigration and Naturalization Policies, Rules, and Regulations as they from time to time [sic] be issued, changed or amended in reference to or which refers to occupational services effected by the maritime industry.
>
> EXCEPTION: Laker vessels which operate inter/intra Great Lakes in sheltered waters, but when linesmen are used by above Lakers they shall be members of the collective bargaining unit.

According to the Union, the application of Section 17.1 provided that, generally, all lines handling is to be performed by bargaining unit employees. An exception occurs when Canadian vessels arrive at the Cargill, Inc. dock at the Port of Indiana. Lines handling on those vessels, at that dock only, is to be performed by alien crewmen from Canadian flagged vessels. The Union further contends that all other stevedoring contractors and other docks at the Port require that all lines be handled by bargaining unit employees. The Union states that this means that the same Canadian flagged vessels which would be tied by alien crew members at the Cargill, Inc. dock, would be tied by United States workers at all other docks and for all other employers at the Port.

The Employer disputes this and contends that throughout the entire history of the Great Lakes grain trade, the handling of lines associated with the docking and casting off of Canadian Lakers at Great Lakes ports has traditionally been performed by crew members employed by the Canadian shipping companies.[FN2] The Employer further contends that such work has never been done by Union members employed by the stevedoring companies. The Employer states that Canadian Lakers are even specially designed to facilitate dockside line handling by their crew members. These vessels have specially designed swinging booms on both the port and starboard side of the bridge house. A scaffold chair is attached to the boom and, as the vessel approaches the dock, the boom swings out and is used to transfer crew members to the dock, before the gangway is laid, so that they can tie the vessel to the dock.

The Union asserts that Section 17.1 was initially included in the collective bargaining agreements and the disputed practice was initially allowed by the Union because the Employers' negotiator stated at the bargaining table that a treaty between the United States and Canada permitted such practice. The Employers allegedly promised to provide to the Union copies of the treaty. Despite requests by union representatives that the Employers provide the promised information, no treaty provisions were ever produced. The Employers deny that they have ever relied upon a non-existent treaty to support their arguments in support of Section 17.1.

IV. ANALYSIS

A. The IMMACT 90 Legislation will not Affect the Outcome of this Analysis Until New Section 258 of the INA Be-

comes Effective

The new legislation in the IMMACT 90 addresses the issue raised by this request for an opinion. IMMACT 90, P.L. No. 101-649, 203, 104 Stat. 4973 (1990). This legislation creates new Section 258 of the INA. We anticipate that the provisions of new Section 258, which define longshore work and include line handling as a longshore activity, will resolve the issue in question. New Section 258, however, will not take effect until May 29, 1991, 180 days after the date of enactment of the IMMACT 90. Therefore, this opinion addresses the question of whether alien crewmen may perform the line handling functions prior to the effective date of new Section 258.

B. Alien Crewmen May Be Employed Only On Board the Vessel on Which They Serve

The INA establishes alien crewman as a special class of nonimmigrant alien. The Act defines a nonimmigrant alien crewman for visa purposes as,

> an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel … , who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived … ;

INA 101(a)(15)(D), 8 USC 1101(a)(15)(D) (emphasis supplied). Although alien crewmen may be employed on board their vessel, United States immigration laws prohibit them from performing labor in the United States. INA 274A(a)(1), 8 U.S.C. 1324a(a)(1); 8 C.F.R. 274a.12(b)(4). The Service's regulations state that a nonimmigrant crewman "may be employed only in a crewman capacity on the vessel … of arrival … ." 8 C.F.R. 274a.12(b)(4) (emphasis supplied). Nonimmigrant aliens admitted to the United States as crewmen are not eligible for employment authorization while they maintain crewman status. Id., 8 C.F.R. 214.1(e). Alien crewmen are also ineligible for change of status to that of another nonimmigrant category which might make them eligible for employment authorization. INA 248, 8 U.S.C. 1258. Further, "any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of Section 241(a)(9) of the Act." 8 C.F.R. 214.1(e). Therefore, an alien crewman who engages in unauthorized employment in the United States is in violation of his or her nonimmigrant status and is subject to deportation from the United States.

The INA does not specify what functions associated with the navigation of a vessel may not be performed by an alien crewman. The INA does not expressly preclude alien crewmen from handling mooring lines. In fact, the INA and its implementing regulations are silent on the question of what are crewman functions. Consequently, this question must be answered on a case-by-case basis by consulting other sources of law.

C. There is some Support for the Proposition that Line Handling is a Function Which Should be Performed By Longshoremen

In International Longshoremen's and Warehousemen's Union [ILWU] v. Meese, 891 F.2d 1374 (9th Cir. 1989) the Ninth Circuit Court of Appeals applied a three prong test to determine whether a ship employee qualified as an alien crewman under the INA. The court considered 1) the nature of the employee's duties; 2) when the duties are performed; and 3) whether the employee has a permanent connection with the ship. Id. at 1382. In ILWU v. Meese, the court held that crane operators, who loaded and unloaded logs from the ships were not alien crewmen within the meaning of the immigration laws because they did not have a permanent connection with the ship. Id. at 1383.

The question before us is whether alien crewmen may leave their vessel and tie up, cast off, or otherwise handle mooring lines on the dock as part of their crewman functions or whether such practice constitutes a violation of the alien's crewman status. While not dispositive of the issue, the three-prong test in ILWU v. Meese is helpful in this analysis.

Applying the test in ILWU v. Meese to the question before us, the following is evident. First, we must examine the

nature of the duties in question. The question becomes whether the line handling function is clearly of a navigational nature, performed in furtherance of the operation or service of the vessel, or whether it is related more to longshore activities. Handling mooring lines appears to be related more to activities performed on shore than activities performed while the ship is in navigation. The Department of Labor's Dictionary of Occupational Titles supports this conclusion.

The Fourth Edition of the Dictionary of Occupational Titles, U.S. Department of Labor (1977) (DOL Dictionary) describes various water transportation occupations as "those concerned with conveying passengers and cargo by controlling movement of ships, boats, and other vessels; securing vessels in dock; opening and closing canal locks; and related activities." DOL Dictionary at 882–83. The DOL Dictionary defines the occupation of "Lines Tender" as follows:

911.687-026 LINES TENDER (water trans.) laborer, marine terminal.

Secures and removes ship's docking lines to and from dock; catches lines heaved from ship attempting to dock. Drags lines to bitts on dock and slips eye of docking lines over bitts. Removes lines from bitts when ships depart. May drive vehicle to pull in docking lines.

Id. at 885. The DOL Dictionary goes on to describe the occupations of Stevedore I (911.663-014) and Stevedore II (922.687-090) as including loading and unloading of ships' cargo. Id. at 884. The description of the work performed by Boat-Loader Helper (911.687-010) states that such an employee "[c]atches mooring hawsers and ties them around dock posts to secure vessels. … Removes lines from vessels and casts off hawsers." Id. The definitions of the occupations of Able Seaman (911.364-010) and Ordinary Seaman (911.687-030) do not include any mention of lines handling or tying of vessels or other dock side activity. Id. at 884, 885.

Second, we must consider when the activity in question is performed. In the case of line handling, the function is performed when the vessel is in port and not while it is engaged in navigation. In its analysis, the court in ILWU v. Meese looked at the timing factor in terms of, whether the duties are performed within or beyond United States territorial waters. ILWU v. Meese, at 1382. While we do not consider the question of territorial waters dispositive of the time factor, we do conclude that the line handling function is performed when the vessel is no longer in navigation.

Finally, assuming that the alien crewmen have a permanent connection with the ship (no evidence to the contrary has been presented), then the third element of the test has been satisfied. This last factor, however, does not come into play in the analysis of who may perform the line handling function because the test in ILWU v. Meese, is intended to determine who is an alien crewman, and not what functions a crewman may perform.

Tying up and casting off a vessel's lines are integral parts of the overall functions of navigation. These activities, however, are clearly in-port functions which take place on shore and not on board the vessel. Consequently, the fact that these activities occur while the vessel is no longer in navigation and the fact that crewmen must disembark in order to tie up the vessel, leads us to conclude that line handling activities are not "required for normal operation and service on board a vessel".

INA 101(a)(15)(D), 8 U.S.C. 1101(a)(15)(D) (emphasis supplied). Therefore, they are not within the scope of a nonimmigrant alien crewman's duties. Alien crewmen who handle mooring lines will violate their status as crewmen by performing labor in the United States, unless they fall within one of the exceptions discussed below.

C. Service Policy Permits Alien Crewmen to Perform Line Handling Functions in Certain Circumstances

The Service has not had an express policy on this issue in the past. However, in practice, the Service has allowed alien crewmen to perform line handling functions in certain circumstances. As described above, Congress recently expressed its views on the issue in question with the creation of new Section 258 of the INA. Although the new legislation prohibits alien crewmen from performing line handling functions, it also creates several exceptions to the general rule. These exceptions closely resemble those circumstances in which the Service permits alien crewmen to perform the line handling.

Although, generally, line handling is a longshore function, there are circumstances under which the Service permits alien crewmen to perform this activity. These circumstances include: (1) cases when the safety of the vessel or the crew is an issue and longshoremen are not available to perform the line handling function; (2) cases which are covered by existing collective bargaining agreements that designate line handling as a task to be performed by crewmen; and (3) cases which cover private ports where longshoremen are not employed or where the prevailing practice at the port allows crewmen to handle lines.

1. Alien crewmen may perform the line handling function when the safety of the vessel or the crew is an issue

Safety considerations dictate that alien crews on board vessels be permitted to tie up or cast off the mooring lines when the safety of the vessel or the crew is an issue. In some emergency situations, longshoremen may not be available to perform the line handling functions. Often, emergency situations which endanger a vessel or its crew cannot be anticipated. Consequently, we will not delineate the circumstances of those situations when the crew or the vessel's safety is an issue and logic dictates that the crew on board the vessel handle the mooring lines. We believe these situations will be rare. Therefore, we cannot justify placing alien crewmen in a position that would jeopardize their immigration status if they were to act in furtherance of the vessel's safety or that of the crew.

2. Alien crewmen may perform the line handling functions when such practice is permitted by an existing collective bargaining agreement

As far as we have been able to determine, currently, both crewmen and longshoremen perform the function of handling mooring lines to secure vessels to and release them from the docks. Whether one group or the other will perform this function at a particular location is usually determined by the collective bargaining agreement between them, when one exists. Our opinion is not intended to disrupt the terms of those existing agreements in any way.

It is our position that where existing collective bargaining agreements designate line handling as a function to be performed by crewmen, an alien crewman does not violate his or her immigration status by engaging in such activity. We believe this position is supported by the language in the IMMACT 90.[FN3] Where the collective bargaining agreement is silent on the issue of line handling, however, we take the position that this is a longshore function and barring other applicable exceptions, cannot be performed by an alien crewman. Under this analysis, the crewmen from Canadian Lakers at Burns International Harbor were not in violation of their crewman status while the collective bargaining agreement was in effect.

3. Alien crewmen may perform the line handling function at ports where longshoremen are not employed or where the prevailing practice at the port allows crewmen to perform this task

Some vessels service small or privately operated (company) ports that do not employ longshoremen. Vessels arriving at such ports would need to be tied to the docks upon arrival and cast off for departure. If there are no longshore workers to perform this task, then it may be performed by the port employees or the vessel's crew according to contractual agreements or prevailing practice at the particular port. Other, larger ports that employ longshoremen have established practices regarding delegation of duties. The prevailing practice varies greatly between ports. If the established practice at a particular port permits crewmen to handle mooring lines, the alien crewman would not violate his or her immigration status by handling the lines. Under this analysis, the crew from Canadian Lakers at Burns International Harbor would be in violation of their crewman status if the collective bargaining agreement has expired and the prevailing practice at that port prevents crewmen from handling lines.

We emphasize that, upon the effective date of new Section 258, May 29, 1991, that section will control the definition of longshore work for immigration purposes and the exceptions that apply to alien crewmen. Consequently, the regula-

tions and policy instructions issued by the Department of Labor, the Department of State, and the Service pursuant to Section 258 of the INA will control the determination of which alien crewmen may engage in what is otherwise considered longshore work and in which ports alien crewmen may engage in such activities. Until Section 258 of the INA becomes effective, we recommend that the Service exercise prosecutorial discretion in pursuing any action against alien crewmen engaged in the activities discussed in this opinion.

/s/ Paul W. Virtue
Acting
Attachments

Genco Opinion 91-16

Legal Opinion: Use of Appropriated Funds To Pay For INS Centennial Promotional Items

Verne Jervis, Co-Chairperson, INS Centennial Steering Committee

CO-1804

February 13, 1991

I. ISSUE PRESENTED

Can the Immigration and Naturalization Service (INS) use funds from its general appropriation to purchase $20,000 worth of items to promote the opportunities and responsibilities of United States citizenship?

II. SUMMARY CONCLUSION

Yes. The purchase of such items is a necessary expense for the implementation of Section 406 of the Immigration Act of 1990 (P.L. 101-649, 104 Stat. 4978), which amended 8 U.S.C. 1443 by adding a new subsection (h):

> In order to promote the opportunities and responsibilities of United States citizenship, the Attorney General shall broadly distribute information concerning the benefits which persons may receive under this title and the requirements to obtain such benefits.

III. FACTS

The INS Centennial Staff wishes to purchase $20,000 worth of various promotional items (e.g., pencils, plastic cups, bookmarks, balloons) which will be imprinted with a message commemorating the INS Centennial and promoting naturalization, and an 800 number which people can use to get additional information. The Centennial Staff will distribute these items to the four Regions, which will then pass them out to the public at various events likely to be attended by persons desiring information about naturalization.

IV. DISCUSSION

31 U.S.C. 1301(a) sets forth the basic test for determining whether an expenditure's purpose is proper:

"[a]ppropriations shall be applied only to objects for which the appropriations were made except as otherwise provided by law." This language does not mean that each activity an agency wishes to conduct must be expressly described and authorized in its appropriation. The test is whether a given expenditure is a "necessary expense" for accomplishing what is usually (INS is no exception) a broad statement of the agency's mission in the appropriation. 6 Comp. Gen. 619 (1927).

The concept of "necessary expenses" is not limited to ones without which the agency could not accomplish its mission, but there are definite limits. Generally the expenditure must:

1. contribute in a significant manner toward accomplishing the purpose of the appropriation;
2. not be prohibited by law; and
3. not be provided for in another appropriation.

Agency officials have great discretion in determining whether or not an expenditure is necessary, but their decisions are not binding on the Comptroller General. 18 Comp. Gen. 285 (1938).

The Comptroller General has held on numerous occasions that federal agencies may not use funds from general appropriations to purchase "gifts" for distribution to members of the public. See, e.g., 57 Comp. Gen. 385 (1978). Those opinions all rest on the lack of a specific statutory authorization for the proposed expenditure. In this instance, however, Congress has specifically directed the Attorney General (in the language quoted above) to disseminate information concerning naturalization, and has authorized the appropriation of funds to carry out this mandate.

Responsible officials in INS have determined that the distribution of items such as those described above will contribute in a significant manner toward accomplishing the statutorily mandated purpose of promoting "the opportunities and responsibilities of United States citizenship." The proposed expenditure is not prohibited by law, and it is not provided for in any other appropriation. Thus the expenditure is a necessary expense and therefore proper within the meaning of 31 U.S.C. 1301(a).

V. CONCLUSION

INS may use funds from its general appropriation to purchase $20,000 worth of promotional items containing information concerning naturalization for distribution to members of the public.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-17

Legal Opinion: Implementation of Family Unity and Legalization Provisions of Immigration Act of 1990

Terrance M. O'Reilly, Assistant Commissioner, Legalization

CO 242

February 14, 1991

I. QUESTIONS

In your memorandum of November 30, 1990, you ask whether INS may begin implementing the family unity provisions of Section 301 of the Immigration Act of 1990 prior to the effective date, October 1, 1991. You also ask whether

INS may begin granting an extension of the deadline for filing applications for adjustment from temporary to permanent residence.

II. SUMMARY CONCLUSIONS

The Act of 1990 specifically prohibits any changes in the present family fairness program.

The provisions of Section 703, extending the application period for lawful permanent resident status were effective upon enactment.

III. ANALYSIS

In the provisions for family unity, in Section 301 of the 1990 Act, Congress enacted a family fairness program somewhat different from the program which the Commissioner had established as part of his discretionary authority. Congress made it clear that the provisions of its program should not be implemented until the effective date. Section 301(g) specifically provides that:

> EFFECTIVE DATE. - This section shall take effect on October 1, 1991; except that the delay in effectiveness of this section shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date.

Congressional intent is clear and INS is bound to continue implementation of the family fairness program as presently constructed, until October 1, 1991.

In Section 703 of the 1990 Act, Congress extended to two years the period within which aliens in temporary resident status may apply for lawful permanent status. Congress did not set a period in which that section was to become effective; accordingly, it is effective upon enactment. It may be noted that Section 703 also amended Section 245A of the Immigration and Nationality Act to provide an additional fee for filing an application for adjustment to lawful permanent status, if such application is made after the end of the first year. A regulation to implement this change should be promulgated.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-18

Legal Opinion: INA 273 Fines and 8 C.F.R. 212.1(a) Documentary Requirements

G. Thomas Graber, Director, National Fines Office

CO 273

February 14, 1991

I. Question Presented

Can a fine be imposed against a carrier under Section 273 of the Immigration and Nationality Act (Act,INA), 8

U.S.C. 1323, for bringing to the United States an alien who does not have an unexpired visa, where the alien is a British subject, resident of the Cayman Islands and arriving directly from the Cayman Islands, in possession of a valid passport and a certificate from the Clerk of Court of the Cayman Islands which evidences one or more convictions?

II. Summary Conclusion

Yes, a fine may be imposed against the carrier under Section 273 of the Act in the circumstances described above.

III. Discussion

Section 273 of the Act requires that an alien brought to the United States on board a vessel/aircraft must have an unexpired visa, if a visa is required under the Act or regulations, and the carrier must pay a fine of $3,000 for each alien brought here in violation of this section. 8 C.F.R. 212.1 states that each arriving nonimmigrant alien must present a valid, unexpired visa and passport. However, 8 C.F.R. 212.1(a) states in relevant part that a visa is not required of a British subject residing in and arriving directly from the Cayman Islands, who presents a current certificate from the Clerk of Court of the Cayman Islands indicating no criminal record.

The National Fines Office asks if a carrier may be fined under Section 273 of the Act for bringing in such a British subject, without a visa, but whose court certificate evidences one or more convictions. The answer is yes, a fine is appropriate against the carrier in such circumstances. The clear language of the regulation at 8 C.F.R. 212.1(a) indicates that the visa requirement is waived only for a British subject whose certificate shows no criminal record. Thus, where the court certificate does show one or more convictions, there is a criminal record and the visa waiver of subsection (a) is inapplicable. In such a case, we revert back to the main body of the regulation at 8 C.F.R. 212.1, which does require a valid unexpired visa. Accordingly, since the carrier brought in a nonimmigrant alien without a visa, and a visa was required in this case under the main body of regulation 8 C.F.R. 212.1, the carrier has violated Section 273 of the Act and a fine is appropriate against the carrier.

For further information, please contact Assistant General Counsel Robert Egan at 514-1260.

/s/ Paul W. Virtue

Acting

Genco Opinion 91-19

Overtime payments in excess of $25,000

Office of Management

CO 1297-C

February 14, 1991

I. QUESTION.

Does the Department's appropriations bill take precedence over the Federal Employees Pay Comparability Act of 1990 (FEPCA) in the case of employees who may be eligible under Title IV of FEPCA for overtime in excess of $25,000?

II. SUMMARY.

The language contained in the Department's appropriation's bill, limiting pay to $25,000 per year, takes precedence over the language in FEPCA.

II. ANALYSIS.

Background. The appropriations bill contains language which prohibits the Immigration and Naturalization Service (the Service) from using administrative funds to pay any employee overtime in an amount in excess of $25,000. Under the new pay cap in FEPCA, there may be some instances where an employee might be eligible for overtime in excess of that amount.

Legal Analysis. Before any federal agency can spend public funds of the United States, there must be an Act of Congress appropriating the money and defining the purpose for which the funds will be spent. In short, an "appropriation" is statutory authority to make a certain payment amount from the Treasury for a specified purpose. 31 U.S.C. 1101(2). If an agency does not have the authority to spend money for an activity, the fact that a statute authorizes that activity is irrelevant.

Therefore, although FEPCA may by its language allow overtime in excess of $25,000 to be paid out of administrative funds, the Department's appropriation specifically prohibits it from paying "any employee overtime time in excess of $25,000." Thus the Service has no authority to expend funds for overtime in excess of that amount despite the language in FEPCA.

If you require additional information on this topic, please contact Sandra B. March, Assistant General Counsel, of my office at 514-1260.

/s/ Paul W. Virtue

Acting

Genco Opinion 91-20

Legal Opinion: Effect of proxy marriage on entry as unmarried child

Officer in Charge Rome

February 15, 1991

QUESTION

By cable, you have presented the following facts: an alien who entered the United States with a P4-3 visa (unmarried child of a fourth preference married son or daughter of a United States citizen) has filed a petition on behalf of her spouse. The alien has revealed that before her entry, she had entered into a proxy marriage but that the marriage was not consummated until after her entry into the United States with the P4-3 visa.

CONCLUSION

A proxy marriage, without consummation, is not valid for immigration purposes. Accordingly, the wife was properly admitted as a P4-3 alien.

ANALYSIS

Section 101(a)(35) of the Immigration and Nationality Act provides that:

> The term "spouse", "wife", or "husband" does not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties are not physically present in the presence of each other, unless the marriage shall have been consummated.

Accordingly, a marriage entered into by proxy, which has not been consummated, is not valid for immigration purposes. Matter of B, 5 I&N Dec. 698 (BIA 1954). See also, Matter of Lew, 11 I&N Dec. 148 (DD 1965). When the alien wife entered into the United States, the proxy marriage had not been consummated. Therefore, she properly entered the United States as an unmarried child of a fourth preference alien.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-21

Legal Opinion: Use of Appropriated Funds For Entertainment Purposes

Verne Jervis, Co-Chairperson, INS Centennial Steering Committee

C0-1804

February 20, 1991

I. ISSUE PRESENTED

Can the Immigration and Naturalization Service (INS) use funds from its general appropriation to pay for refreshments to be served at open houses held as a part of its Centennial celebration?

II. SUMMARY CONCLUSION

No. The purchase of refreshments for serving to federal employees and members of the public at open houses, even ones held as part of the INS Centennial, is not a necessary expense for the implementation of either (1) the general INS appropriation (P.L. 101-515, 104 Stat. 2113), or (2) Section 406 of the Immigration Act of 1990 (P.L. 101-649, 104 Stat. 4978).

III. FACTS

Various INS Regional and District offices wish to hold open houses as a part of the INS Centennial. They intend to invite both other federal employees and members of the public. These open houses would serve both ceremonial and educational functions; i.e., they would both commemorate INS's 100 years of service and give attendees an opportunity to learn more about its current programs.

IV. DISCUSSION

31 U.S.C. 1301(a) sets forth the basic test for determining whether an expenditure's purpose is proper: "[a]ppropriations shall be applied only to objects for which the appropriations were made except as otherwise provided by law." This language does not mean that each activity an agency wishes to conduct must be expressly described and authorized in its appropriation. The test is whether a given expenditure is a "necessary expense" for accomplishing what is usually (INS is no exception) a broad statement of the agency's mission in the appropriation. 6 Comp. Gen. 619 (1927).

The concept of "necessary expenses" is not limited to ones without which the agency could not accomplish its mission, but there are definite limits. Generally the expenditure must:

1. contribute in a significant manner toward accomplishing the purpose of the appropriation;

2. not be prohibited by law; and

3. not be provided for in another appropriation.

Agency officials have great discretion in determining whether or not an expenditure is necessary, but their decisions are not binding on the Comptroller General. 18 Comp. Gen. 285 (1938).

The Comptroller General has held on numerous occasions that federal agencies may not use funds from general appropriations to pay for "entertainment" expenses unless they have specific statutory authority to do so. E.g., 47 Comp. Gen. 657 (1968); 43 Comp. Gen. 305 (1963). These opinions also make it clear that the serving of meals or refreshments constitutes entertainment for the purpose of this restriction. Id.

The only notable exception to this general rule against paying for meals or refreshments from a general appropriation is for recognition ceremonies conducted under authority of the Government Employees' Incentive Awards Act, 5 U.S.C. 4501–4506. E.g., 65 Comp. Gen. 738 (1986). The Comptroller General has allowed federal agencies a great deal of discretion in determining what constitutes a ceremony conducted under authority of this Act. E.g., 66 Comp. Gen. 536 (1987). There has been no suggestion, however, that these open houses are being conducted under this authority; thus this exception is inapplicable.

Moreover, the Comptroller General has not extended its scope to include functions attended by the general public. Thus, payment for refreshments at these open houses would not be proper even if one of their purposes were to recognize INS employees under the Government Employees' Incentive Awards Act.

It is true that Section 406 of the Immigration Act of 1990, supra, directs the Attorney General to "distribute information concerning the benefits which persons may receive under [Title 8 of the United States Code] and the requirements to obtain such benefits," and that the distribution of such information is one of the purposes of the open houses. We do not believe, however, that we could successfully argue that the serving of refreshments was a necessary expense to this distribution.

See, e.g., 57 Comp. Gen. 806 (1978). This opinion concerned a proposed expenditure to provide refreshments to jurors during their deliberations, a period during which they were not free to leave and purchase their own. Despite the fact that the Jury Committee of the Judicial Conference of the United States had adopted a resolution supporting such expenditures, and the argument that refreshments would improve both the quality and speed of the juries' deliberations, the Comptroller General found that refreshments were not a necessary expense.

As the Director [of the Administrative Conference of the United States] points out, we have a long established rule that the expenditure of appropriated funds to procure food, beverages, or meals or snacks is in the nature of an entertainment expense and is thus prohibited unless funds are specifically provided therefor in the relevant appropriations act … . Accordingly, it is our view that the funds provided for jurors' fees and expenses in the Judiciary Appropriations Act … not being specifically available for the purchase of snacks for jurors may not be expended for this purpose. Id. at 807–08.

V. CONCLUSION

INS may not use funds from its general appropriation to purchase refreshments to serve at open houses which it plans to hold as part of its Centennial celebration.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-22

Service Authorization for Removal of Magazine Disconnectors

Michael S. Williams, Chairman, Firearms Review Board

February 21, 1991

ISSUE

The Firearms Review Board has requested an opinion as to whether the Service could incur liability by authorizing the removal of magazine disconnectors from personally-owned firearms. The Board has received field requests from officers who are seeking to modify their personally-owned weapons so that they meet Service-approved criteria, and could be authorized to carry such weapons. While regular production Smith & Wesson pistols are equipped with magazine disconnectors, Section 4210 of the Administrative Manual specifically prohibits their use. (Smith & Wesson typically does not install magazine disconnectors on FBI and other law enforcement contract work, so that the weapon can fire a round in the chamber, with the magazine removed).

CONCLUSION

Subject to certain considerations discussed below, it is my conclusion that should individual officers choose to modify their weapons, and these weapons are subsequently approved to be carried, the Service would not be risking any liability from approval of the modified firearms.

DISCUSSION

The weapons in question are privately-owned firearms. The Service exercises no dominion over its employees' personal property, and as such, cannot authorize the modification. The election to modify a privately-owned Smith & Wesson pistol is strictly a voluntary decision of the officer who owns the pistol. The officer has the option of continuing to use the Service-issued weapon, and is under no obligation whatsoever to modify his personally-owned firearm. The expense incurred, or any risk of damage to the firearm as a result of attempting to remove the magazine disconnector, must be borne by the owner.

Subsection 12 A.(2) of Section 4210 of the Administrative Manual prohibits the use of magazine disconnectors on semiautomatic pistols. Although their use is not sanctioned by the firearms industry as a whole, the magazine disconnector may offer improved safety under certain circumstances. However, the Service, along with most other law enforcement organizations, has concluded that the availability of the last round to an officer in an crisis situation far outweighs any possible safety advantage of the disconnector.

Subsequent to the owner removing the magazine disconnector, there is no impediment to Service approval of a modified Smith & Wesson, assuming it meets all other Service criteria. As outlined in Subsection 12 A.(2) of Section 4210 of the Administrative Manual, personally-owned handguns must be inspected and certified in writing by the District or Sector Firearms instructor to be in safe and serviceable condition. Transitional training to the use of semiautomatic pistols,

also required when an officer chooses to begin carrying a personally-owned firearm, should emphasize the fact that the modified pistol no longer has the magazine disconnector function.

/s/ Paul W. Virtue
General Counsel (Acting)

Genco Opinion 91-23

Legal Opinion: Your August 13, 1990 memorandum; Determination of date of final decision in denied cases

R. Michael Miller, Deputy Assistant Commissioner, COADN

CO 103.6-C

February 21, 1991

QUESTION

You have asked whether a denial of a petition or an application must be considered not yet final if the time for filing an appeal has not lapsed, or if a timely appeal is taken but has not yet been decided. The Western Region has expressed concern that if a Form I-130 or I-140 petition filed in conjunction with an I-485 application for adjustment of status is denied, the I-485 will be considered to be pending throughout the pendency of the visa petition appeal. Thus, the alien will continue to be eligible for work authorization during that whole period.

SUMMARY CONCLUSION

If the decision is appealable to the Board of Immigration Appeals (BIA or Board), such as an I-130 relative petition, the decision may not be considered final for purposes of execution during the time for filing an appeal unless appeal is waived, or during the pendency of an appeal, or while the case is before the Board on certification.

The regulations are silent regarding the finality of INS decisions that are not appealable to the BIA.

It is our opinion that as long as a decision may be reversed on direct appeal or certification, the Service should not consider that decision final. This includes I-140 third- and sixth-preference petitions. This means that the accompanying application for adjustment of status may not be denied on the basis of the visa petition denial. Therefore, the alien beneficiary remains eligible for employment authorization. The regulations should be amended to make explicit when these INS decisions become final.

DISCUSSION

Decisions Appealable to the BIA Are Not Final Until the Right To Appeal Is Waived, the Time for Appeal Has Expired, or the Appeal or Certification Is Decided

The regulations provide that if a decision is appealable to the Board of Immigration Appeals, the decision is not considered final during the time for filing an appeal unless appeal is waived, or during the pendency of an appeal, or while the case is before the Board on certification. 8 C.F.R. 3.6. This category includes decisions of immigration judges and decisions by the INS on:

- administrative fines and penalties,

- petitions filed under Section 204 of the Immigration and Nationality Act (except petitions to accord preference classification under Section 203(a)(3) or (6) of the Act or a petition on behalf of a child described in Section 101(b)(1)(F) of the Act), including revocation of approval of those petitions under Section 205 of the Act,
- applications for waivers under Section 212(d)(3) of the Act, and
- some bond decisions made by district directors pursuant to 8 C.F.R. 242.2(d).

8 C.F.R. 3.1(b).

In contrast, the filing of a motion to reopen an immigration matter does not affect the finality of the decision or stay the execution of an order unless a stay is specifically granted. 8 C.F.R. 3.8, 103.5(a), and 242.22.

The Regulations Are Silent Regarding the Date of Final Decision on Applications and Petitions Not Appealable to the Board of Immigration Appeals

The regulations on appeals from or certification of Service decisions not appealable to the BIA but rather appealable to the Administrative Appeals Unit (AAU) under the Associate Commissioner, Examinations, do not deal with the question of finality. 8 C.F.R. 103.3 and 103.4. The more than 30 types of decisions in this category are listed at C.F.R. 103.1(f)(2).

INS Regulations Should Be Amended To State Explicitly That a Decision That Is Appealable to the AAU Is Not Final Until the Right To Appeal Is Waived, the Time for Appeal Has Expired, or the Appeal or Certification Is Decided

In our opinion, as long as a decision may be reversed on direct appeal or certification, the merits of the matter have not been finally determined and, therefore, the decision should not be acted upon as if it were final. Therefore, if the denial of the visa petition is appealed timely, any accompanying application for adjustment of status remains pending, see 8 C.F.R. 245.2(a)(2)(ii), and the applicant for adjustment continues to be eligible for employment authorization pursuant to C.F.R. 274a.12(c)(9).

However, once the administrative appeal has been waived or the appeal or certification has been decided, the decision should be executed unless a stay is granted by the administrative decision-maker or appellate body (in the case of a motion to reopen) or the court (if judicial review is sought). This course of action is modeled on the one used in 8 C.F.R. 3.6 in conjunction with 8 C.F.R. 103.5(a).

/s/ Paul W. Virtue

Acting

Genco Opinion 91-24

Legal Opinion Revision of Opinion Relating to Cambodian Orphan Petitions

John R. Schroeder, Assistant Commissioner, Adjudications

CO 204.22-C

February 21, 1991

ATTN: Jack Tabaka, Senior Immigration Examiner

The purpose of this memorandum is to correct statements made in our memorandum of July 20, 1990. In that memorandum, this Office issued an opinion stating that "the Trading with the Enemy Act does not apply to dealings with Cambodia." We then concluded that the Act had no bearing on the validity of Cambodian adoption records.

I. The Trading with the Enemy Act is applicable to Cambodia

Our statement that the Act is inapplicable to Cambodia was incorrect. Although the United States is no longer at war in Indo-China, Congress has provided for extension of the national emergency powers which were being exercised with respect to a country on July 1, 1977. Cambodia is one of those countries and accordingly, the Trading with the Enemy Act is applicable to Cambodia.

The Department of the Treasury has promulgated regulations, at 31 C.F.R. Part 500, covering Cambodia. In brief summary, the regulations prohibit transactions by persons subject to the jurisdiction of the United States with regard to any property in which Cambodia or any national thereof has an interest. Under the regulations, certain transactions may be carried out under license by the Department of Treasury.

II. Adoptions of Cambodian Children are not Prohibited by the Trading with the Enemy Act. However, Financial Transactions Relating to Such Adoptions may be Prohibited.

As described above, the regulations which set forth restrictions on transactions with Cambodia or its subjects and citizens extend to financial dealings. An adoption of a Cambodian subject or citizen is not prohibited in those regulations. However, financial transactions relating to such adoptions are prohibited when they involve property in which Cambodia or a national thereof has an interest. See 31 C.F.R. 500.201(b). It is a violation of the Trading with the Enemy Act, therefore, to transfer funds to Cambodia or a Cambodian national in connection with an adoption proceeding, either directly by an individual or through an adoption agency.

It is not within the Service's jurisdiction to regulate such activities. However, the Department of Treasury should be notified when such information comes to the attention of Service employees.

In our July 20, 1990, memorandum, we concluded that the Service should process Cambodian orphans as orphans coming to the United States to be adopted. We continue to hold to that opinion.

/s/ Paul W. Virtue

Acting

Genco Opinion 91-25

Legal Opinion "Aggravated Felony": Applicability to Convictions Prior to November 18, 1988

All Regional Counsel, All District Counsel

February 22, 1991

I. QUESTIONS PRESENTED

1. Whether the definition of "aggravated felony" under Section 101(a)(43) of the Act applies retroactively to convictions occurring prior to November 18, 1988.

Answer: Yes, except for new crimes added in the broadened definition by IMMACT.

Discussion: The Anti-Drug Abuse Act of 1988 (ADAA) 7342, which first introduced the term "aggravated felony" to the Immigration and Nationality Act (Act), provided no time limitation on the applicability of the term as defined under Section 101(a)(43) of the Act, regarding either the date of conviction or commission of the crime.

It is clear that Congress intended to apply the term "aggravated felony" to convictions that occurred prior to the date of enactment of ADAA, November 18, 1988. To illustrate, subsection (b) was added to Section 276 of the Act by ADAA 7345. The amendment provides in pertinent part that if an alien's deportation was subsequent to a conviction for an "aggravated felony", the criminal penalties for reentry are enhanced. Section 7345 applies to "any alien who enters, attempts to enter, or is found in the United States on or after the date of enactment of this Act (ADAA)."

In order to make the amendment applicable to aliens who arrive on November 18, 1988, such aliens would need to have convictions for an "aggravated felony" before November 18, 1988. The courts presume that the legislative purpose is expressed by the ordinary meaning of the words used by Congress. INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987); INS v. Phinpathya, 464 U.S. 183, 189 (1984).

Likewise, Section 212(a)(17) of the Act, which now provides a twenty-year bar to the reentry of previously deported aggravated felons, originally applied a ten-year bar to any alien "who seeks admission to the United States on or after the date of enactment" of ADAA, November 18, 1988. ADAA 7349. This section necessarily applied to those convictions occurring prior to the amendment to the Act, to make it workable. IMMACT 514(a) merely increased the time period from ten to twenty years, making only the increased time period applicable to arrivals on or after January 1, 1991.

Furthermore, convictions for some of the defined "aggravated felonies" separately incur deportability under grounds other than the aggravated felony ground of deportability. For instance, sections 241(a)(4)(A) (crimes involving moral turpitude) and 241(a)(11) of the Act (narcotics offenses) are not time limited other than by the requirement that the crime be committed "after entry." However, as provided by Gordon and Mailman, Immigration Law and Procedure, "their designation as aggravated felonies by ADAA subjects them to additional sanctions." 4.16a at 4-155.

Thus, unless otherwise limited in its application under a specific section of the Act, the term "aggravated felony" under Section 101(a)(43) of the Act attaches retroactively to convictions occurring before, on or after November 18, 1988 that fall within the definitional Section 101(a)(43) of the Act. The only exception is the newest group of crimes introduced by IMMACT, namely money laundering, non-political crimes of violence resulting in a five year sentence and foreign convictions, which have their own limitation. They are defined as aggravated felonies only if they are committed on or after November 29, 1990. IMMACT's other references to illicit drug trafficking and state law violations are expressly applied retroactively, "as if included" in ADAA, making them also applicable to convictions entered prior to November 18, 1988. IMMACT 501(b).

2. Whether Section 236(e) (mandatory detention of aggravated felon during exclusion proceedings) applies to convictions occurring before November 18, 1988.

Answer: Yes.

Discussion: Significantly, unlike most of the remaining provisions of Subtitle J, Section 7342 of ADAA, which added Section 101(a)(43) to the Act, provided no time limitation on applicability of the definition of "aggravated felony" either as to date of conviction or commission of a crime, for the described crimes to qualify as aggravated felonies. Unless otherwise specifically limited by another section of the Act, the term "aggravated felony" per se applies retroactively to convictions entered before the date of enactment of ADAA, November 18, 1988, with the exception of money laundering, crimes of violence resulting in five years imprisonment or foreign convictions, which have their own definitional cut-off date of November 29, 1990.

Thus IMMACT's amendment to section to Section 236(e) of the Act, which requires the mandatory detention of any aggravated felon during exclusion proceedings, and places no time limitation as to the date of conviction, applies to con-

victions entered before, on or after November 18, 1988, with the exception of convictions for money laundering, non-political crimes of violence resulting in a five year sentence or foreign convictions which must be committed on or after November 29, 1990. Section 101(a)(43) of the Act. The effective date for mandatory detention is November 29, 1990. IMMACT 504(c).

3. Whether Section 241(a)(4)(B) (deportation ground) applies to convictions entered before November 18, 1988.

Answer: No.

Discussion: Section 7343 of ADAA, Deportation of Aliens Committing Aggravated Felonies, which added Section 241(a)(4)(B) of the Act (deportation ground), specifically provides that the amendment applies to "[a]ny alien who has been convicted, on or after the date of the enactment of this Act (November 18, 1988), of an aggravated felony."

4. Whether Section 242(a)(2)(A) (mandatory detention of aggravated felon in deportation proceedings) applies to convictions entered before November 18, 1988.

Answer: No.

Discussion: Sections 7343(a) and 7347 of ADAA, which added sections 242(a)(2)(A) (mandatory detention during deportation proceedings) and 242A(a) and (d) of the Act (expedited deportation proceedings for aliens convicted of aggravated felonies), respectively, apply only to those aliens "convicted" of an aggravated felony on or after November 18, 1988. The final conviction itself triggers the mandatory detention in deportation proceedings, even if it is not charged in the Order to Show Cause.

5. Whether sections 276(b)(2) (aggravated felon criminal reentry) and 212(a)(17) of the Act (aggravated felon reentry exclusion ground) can apply to a conviction entered before November 18, 1988.

Answer: Yes.

Discussion: Section 276(a) of the Act provides as follows:

> (a) Subject to subsection (b), any alien who -
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States … shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

Subsection (b) was added to Section 276(a) of the Act by 7345 of the ADAA. The amendment provides, in pertinent part, that if an alien's deportation was subsequent to a conviction for an "aggravated felony", the criminal penalties for re-entry would be higher. Section 7345 applies to "any alien who enters, attempts to enter, or is found in the United States on or after" November 18, 1988. In order to make the amendment applicable to aliens who arrive on November 18, 1988, such aliens would need to have convictions for an "aggravated felony" before the enactment date.

Likewise, Section 212(a)(17) of the Act, as amended by Section 7349 of ADAA (reentry after aggravated felony exclusion ground), applies to any alien "who seeks admission to the United States on or after" November 18, 1988. This section necessarily applies to those convictions occurring prior to the amendment to the Act, to make it workable.

6. Whether amended Section 101(f)(8) (persons not of good moral character) applies to aggravated felony convictions occurring prior to November 29, 1990.

Answer: No.

Discussion: Section 509 of IMMACT, which replaces "murder" with "aggravated felony" in Section 101(f)(8) of the Act, is applicable only to convictions occurring on or after November 29, 1990. Such a conviction permanently precludes a finding of good moral character, thus constituting a permanent bar to future discretionary relief such as voluntary departure or suspension of deportation.

7. Whether the bar to asylum (section 208) and withholding of deportation (section 243(h)) applies to convictions entered before November 18, 1988.

Answer: Yes, except for the added IMMACT crimes of money laundering, crimes of violence and foreign convictions.

Discussion: Section 515(a)(1) of IMMACT provides that an alien who has been convicted of an aggravated felony "may not apply for or be granted asylum." This provision applies to applications for asylum "made on or after" November 29, 1990. Subsection (a)(2) provides that an aggravated felony conviction constitutes a "particularly serious crime", which precludes withholding of deportation under Section 243(h)(2) of the Act. This latter provision applies to convictions "entered before, on or after" November 29, 1990. Thus, the aggravated felony conviction may occur at any time, whether before November 29, 1990 or before November 18, 1988, to trigger the bar to asylum or withholding of deportation for applications "made" on or after November 29, 1990, excepting the new crimes added by IMMACT, namely, money laundering, crimes of violence and foreign convictions, which must be committed on or after November 29, 1990.

8. Whether the bar to Section 212(c) relief applies to convictions occurring at any time, including before November 18, 1988.

Answer: Yes.

Discussion: Section 511 of IMMACT provides that Section 212(c) relief "shall not apply to an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least five years." This bar applies to "admissions occurring after" November 29, 1990, i.e. to those aliens seeking this 'waiver of inadmissibility' after November 29, 1990 (including those in deportation proceedings). There is no time limitation as to the date of the conviction, thus the conviction may fall at any time before, on or after November 18, 1988 if it fits the definition under Section 101(a)(43) of the Act, excepting money laundering, crimes of violence and foreign convictions committed on or after November 29, 1990.

9. Whether the bar to voluntary departure under Section 244(e)(2) of the Act applies to convictions entered before November 18, 1988.

Answer: No.

Discussion: Section 244(e)(2) of the Act, making an aggravated felony conviction a specific bar to voluntary departure, was added by ADAA 7343(b). This provision applies solely to convictions entered on or after November 18, 1988.

10. Whether the term aggravated felony applies to convictions occurring before November 18, 1988 for purposes of the shortened 30-day period for filing a petition for review under Section 106(a)(1) of the Act.

Answer: No.

Discussion: Section 502 of IMMACT merely replaces "60 days" with "30 days" for purposes of an aggravated felon's filing with the circuit court a petition for review of the decision of the Board of Immigration Appeals. The 60 day period for aliens convicted of aggravated felonies was originally inserted by ADAA 7347(b), which applied only to convictions occurring on or after November 18, 1988. Thus, the conviction must have occurred on or after November 18, 1988 to trigger the shorter filing period. ADAA 7347(b).

11. Whether IMMACT's amendment to Section 106(a)(3) of the Act (exception to automatic stay of deportation on petition for review) applies retroactively to an aggravated felony conviction occurring before November 18, 1988.

Answer: Yes.

Discussion: As previously stated, the Section 101(a)(43) definition of "aggravated felony" applies retroactively to convictions occurring before November 18, 1988, except with regard to the crimes of money laundering, crimes of violence where five years' imprisonment was imposed and foreign convictions which must be committed on or after November 29, 1990. Section 513 of IMMACT provides an exception to the automatic stay of deportation, unless the court otherwise directs, where an alien "is convicted of an aggravated felony." There is no time requirement for the date of conviction in the amendment. Thus, applying the definitional section, Section 101(a)(43) of the Act, the section applies retroactively to convictions occurring before November 18, 1988.

This statutory exception to the automatic stay of deportation may be employed based upon a final aggravated felony conviction, even if it is not charged in the Order to Show Cause. On February 20, 1991, an alien was removed under Section 106(a)(3) of the Act while his Petition for Review was pending, after his request for a stay of deportation was denied by the Fifth Circuit. Gallegos-Garcia v. INS, No. 91-4095, unpublished (5th Cir. February 14, 1991). He had been ordered deported under Section 241(a)(11) and had not been charged as an aggravated felon because his drug conviction occurred in 1987. (The Fifth Circuit also denied a stay request by a petitioner ordered deported by the BIA under 241(a)(4)(B) of the Act in the case of Zavala v. INS, No. 91-4093 (5th Cir. February 11, 1991)). Further, a conviction may be relied upon for this supplemental issue of a stay even if it has not previously been included in the record of proceedings before the immigration judge or BIA.

CONCLUSION

The additional sanctions associated with a conviction for an aggravated felony, and any operative cut-off date for the offense, depend upon the specific section of the Act relied upon, which should be examined each time with care. While it is unnecessary in many instances to recite the aggravated felony ground of deportability in the charging document, to invoke the respective immigration consequences under the Act, the aggravated felony ground of deportability should be charged in the Order to Show Cause if the final conviction for an aggravated felony is known to exist at the time the Order to Show Cause is prepared. Any questions should be addressed to William Joyce, Associate General Counsel, or Kim Bingham, Assistant General Counsel, at FTS 368-2895.

/s/ Paul W. Virtue
Acting

CHART

APPLICABILITY OF "AGGRAVATED FELONY" TO SECTIONS OF THE IMMIGRATION AND NATIONALITY ACT (ACT)

SECTION OF ACT	CONVICTION DATE[FN*]
1. 101(a)(43)-definition	ANYTIME
2. 101(f)(8)-GMC	ON OR AFTER 11/29/90
3. 106(a)(1)-pet.for review period	ON OR AFTER 11/18/88
4. 106(a)(3)-pet.for review, no stay	ANYTIME
5. 208-asylum bar	ANYTIME
6. 212(c)-section 212(c) relief	ANYTIME
7. 212(a)(17)-ag.felon reentry	ANYTIME
8. 236(e)-mandatory det.exclusion	ANYTIME
9. 276(b)(2)-criminal reentry	ANYTIME
10.241(a)(4)(B)-deportation ground	ON OR AFTER 11/18/88
11.242(a)(2)(A)-mandatory det.deport	ON OR AFTER 11/18/88
12.243(h)(2)-part. serious crime	ANYTIME
13.244(e)-voluntary departure	ON OR AFTER 11/18/88

[FN*] IMMACT 501(a) broadens the definition of "aggravated felony" to include three new crime categories

which qualify as aggravated felonies only if committed on or after November 29, 1990. They are: money laundering, non-political crimes of violence resulting in five years' imprisonment or foreign convictions.

Genco Opinion 91-26

Review of Eastern Regional Policy for Service Officers Entering Canada

Michael S. Williams, Chief, U.S. Border Patrol

February 26, 1991

At your request my office has reviewed the memorandum from Stanley E. McKinley, Eastern Regional Commissioner, dated October 18, 1990, concerning the Eastern Region policy on the pursuit of persons and/or vehicles into Canada by Border Patrol Agents.

As you may recall, this issue has been reviewed in the field and Headquarters, several times during the past two years. While we fully support continued cooperation with Canadian authorities on enforcement activities, we caution our officers entering into Canada in the manner described in the memorandum, and recommend a written agreement between United States and Canadian authorities addressing this particular issue. Our concern stems from the fact that agents operating in this manner may not be protected by either absolute or qualified immunity and may be personally liable for their actions.

In a previous Legal Opinion, dated October 6, 1990, we indicated that a United States Border Patrol Agent's authority to act on behalf of the United States Government ceases at the time he enters Canadian Territory. See attached. Accordingly, he may not be protected by absolute immunity for civil action damages nor qualified immunity related to constitutional torts as referenced in our previous memorandum. While the guidelines in the McKinley memorandum of October 1990 set forth a strict set of procedures for entry into Canada for surveillance purposes, we maintain the position that Border Patrol Agents may not be protected from potential liability and recommend the execution of a memorandum of understanding with the Canadian Government.

The Constitutional Torts Branch of the Department has also been consulted on this issue and recommends a memorandum of understanding be executed to cover the circumstances envisioned in the McKinley memorandum. Such a memorandum could include a provision stating that Border Patrol Agents entering Canadian territory for surveillance and related activities, with the permission of the appropriate Canadian authorities, would be accorded the same privileges and immunities as when they are acting within the scope of their official duties within their own country. While the language may be modified, the goal is to provide indemnification for the Border Patrol Agents to the greatest extent possible.

In consultation with representatives of the United States Customs Service, they have advised that memorandums of understanding have been executed concerning the operations of their officers in Canada, but prior attempts at receiving indemnification have been unsuccessful to date. It has been the position of Canadian authorities that immunity cannot be granted unless the individual is attached to the American Embassy in Canada, performing duties associated with that post. This does not however preclude us from requesting immunity for our assistance in these matters.

I trust that this information will be of assistance. My staff would be pleased to assist your office in the pursuit of a memorandum of understanding with the Canadian Government covering these circumstances.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-27

Legal Opinion Temporary protected status and eligibility for adjustment of status under Section 245

Jim Puleo, Associate Commissioner, Examinations

CO 245-C

March 4, 1991

ATTN: Michael Shaul, Senior Immigration Examiner

I. QUESTIONS

This Legal Opinion concerns the following hypothetical situation: A native and citizen of El Salvador entered the United States without inspection some time prior to September 19, 1990. The alien has been physically present in the United States continuously since that date. The alien applied for and received temporary protected status, pursuant to sections 302 and 303 of the Immigration Act of 1990, as implemented in regulations published at 56 F.R. 618 (1991). In the meantime, the Service approved a petition to classify the alien for an immigrant visa.

As a general practice, we consider it imprudent to give Legal Opinions concerning hypothetical situations. Since there is a strong likelihood that the Service will encounter a large number of cases similar to this hypothetical, however, this Legal Opinion addresses the following questions: A.Is the alien eligible for adjustment of status under Section 245 of the Immigration and Nationality Act? B.If the answer to question A is no, would the alien's departure from the United States and return pursuant to a grant of advance parole remove the alien's ineligibility for adjustment?

II. SUMMARY CONCLUSIONS

A. An alien who entered the United States without inspection is ineligible for adjustment of status. A grant of temporary protected status would not make the alien eligible.

B. Departure and return under advance parole would relieve an alien of ineligibility for adjustment only if the alien is classified as an immediate relative or as a special immigrant under Section 101(a)(27)(H) or (I).

III. ANALYSIS

A. Because the Alien Entered the United States without Inspection, the Alien Would Be Ineligible for Adjustment under Section 245

The Immigration and Nationality Act of 1952 ("INA"), as amended, provides a framework under which the Attorney General may grant Temporary Protected Status ("TPS") to aliens of certain foreign states designated by the Attorney General. INA 244A, 8 U.S.C. 1254a. Congress enacted Section 244A as part of the Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649 302, 104 Stat. 4978, —. Section 303 of IMMACT 90 designates El Salvador as a foreign state for purposes of Section 244A. The Attorney General, therefore, has authority to grant TPS to eligible aliens from El Salvador. The question under consideration arises from a provision of Section 244A. This provision reads: (f) Benefits and Status During Period of Temporary Protected Status.—During a period in which an alien is granted temporary protected status under this section—**** (4) for purposes of adjustment of status under Section 245 and change of status under

Section 248, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

INA 244A(f)(4), 8 U.S.C. 1254a(f)(4).

An alien who is in an unlawful status or who has failed continuously to maintain lawful status is ordinarily ineligible for adjustment of status. Id. 245(c)(2), 8 U.S.C. 1255(c)(2). Because of Section 244(f)(4), however, Section 245(c)(2) will not apply to a Salvadoran granted TPS, but only for the period during which the alien is in TPS. Section 245(c)(2) is not the only ground on which an alien may be barred from adjustment, however. One fundamental requirement for adjustment is that the alien must have been "inspected and admitted or paroled into the United States." Id. 245(a), 8 U.S.C. 1255(a). Since an alien who entered without inspection, by definition, cannot satisfy this requirement, the alien is ineligible for adjustment.

B. Departure and Return under Advance Parole Would Relieve only Certain Aliens from Ineligibility for Adjustment

The Attorney General has authority to permit Salvadoran aliens granted TPS to travel abroad and return to the United States under advance parole. Id. 244A(f)(3), 8 U.S.C. 1254a(f)(3); IMMACT 90, Pub. L. No. 101-649, 303(c)(4), 104 Stat. at —. As noted, an alien who has been paroled into the United States may be granted adjustment, if otherwise eligible. Id. 245(a), 8 U.S.C. 1255(a). Travelling abroad and returning under advance parole, however, generally would not make a Salvadoran who had entered without inspection eligible for adjustment. The regulations governing adjustment of status provide: Effect of departure. The departure and subsequent reentry of an individual who was employed without authorization … does not erase the bar to adjustment of status in Section 245(c)(2) of the Act. Similarly, the departure and subsequent reentry of an alien who has not maintained a lawful immigration status on any previous entry into the United States does not erase the bar to adjustment of status in Section 245(c)(2) of the Act for any application filed on or after November 6, 1986.

8 C.F.R. 245.1(c)(3) (emphasis added). Under Section 244A(f)(4), an alien is to be considered as satisfying the requirement of Section 245(c)(2) only so long as the alien is in TPS. INA 244A(f)(4), 8 U.S.C. 1254a(f)(4). Section 244A(f)(4) does not make lawful the alien's unlawful presence in the United States prior to the granting of TPS. See id. Thus, the alien's return to the United States under advance parole would not ordinarily relieve the alien of the ineligibility for adjustment that results from the alien's prior unlawful status.

This restriction will not apply to some aliens. Section 245(c)(2) does not apply to aliens classified as immediate relatives or as special immigrants under Section 101(a)(27)(H) or (I). INA 245(c)(2), 8 U.S.C. 1255(c)(2). Thus, a Salvadoran granted TPS who then goes abroad and returns under advance parole may be eligible for adjustment if the Salvadoran is classified as an immediate relative or as a special immigrant under Section 101(a)(27)(H) or 101(a)(27)(I).

/s/ Paul W. Virtue

Acting

Genco Opinion 91-28

Legal Opinion: Continued Effect Of Operating Instruction 214.2(b)(1), Allowing Use of B visas for Aliens "Otherwise Classifiable as H-1"

James A. Puleo, Associate Commissioner, Examinations

March 5, 1991

I. QUESTION

You have asked whether the provisions of the Immigration Act of 1990 (IMMACT) affect the continued validity of Operations Instruction (OI) 214.2(b)(1) which provides for admission as a B-1 nonimmigrant of an alien "otherwise admissible as a H-1."

II. CONCLUSION

The OI should be amended to delete B nonimmigrant visa availability to an alien who meets the definition of an H-1 nonimmigrant. Other provisions of the Operations Instructions may also require amendment.

III. ANALYSIS

The provisions of the Immigration and Nationality Act (Act) relating to nonimmigrants have been substantially changed by IMMACT.[FN1] The H-1B category is revised to cover an alien who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in Section 214(i)(1), and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with, and had approved by, the Secretary an application under Section 212(n)(1).

The new O nonimmigrant visa is available to eligible aliens with extraordinary ability in the sciences, arts, education, business, or athletics. The new P nonimmigrant visa is available to certain eligible aliens who are athletes and entertainers. IMMACT also creates a new Q nonimmigrant visa for eligible aliens coming to participate in international cultural exchange programs.

IMMACT added a new Section 214(g) to the Act, which sets limitations to the number of certain nonimmigrant visas which may be issued in a fiscal year, including a limit of 65,000 for H-1B visas; 66,000 for H-2B visas; and 25,000 for P-1 and P-3 visas.

In summary, the substantial changes made by IMMACT which affect the OI include: (1) a change in the definition of an H-1B; (2) a requirement at Section 212(n)(1) that H-1B nonimmigrant visa not be issued unless the employer has received an attestation from the Department of Labor that the alien will be paid at a prevailing wage rate and that working conditions of other workers will not be adversely affected; (3) the creation of new nonimmigrant categories O, P, and Q; and (4) numerical limitations for H-1B, H-2B visas, P-1, and P-3 visas.

The opinion of this Office is that these new provisions more narrowly define the H-1B category.[FN2] Accordingly, the Service should reconsider the policy expressed in OI 214.2(b)(1), which allows aliens who meet the H-1B nonimmigrant visa definitions to be admitted as B-1 visitors.

You stated in your memorandum that the OI provision allowing for H-1 aliens to enter as B-1's derive from the decision in Matter of Hira, 11 I&N 824 (Attorney General 1966). In Hira, the Attorney General affirmed the decision of the Board of Immigration Appeals that an alien who was coming in periodically to obtain contracts for tailoring for a business abroad should be admitted as a B-1. The B-1 visa continues to be appropriate in such cases. The view of this Office is that the factors enumerated by the Board properly define a B-1 alien, or an alien coming to do business in the United States. As stated by the Board, the significant considerations to be stressed are that there is a clear intent on the part of the alien to continue the foreign residence and not to abandon the existing domicile; the principal place of business and the actual place of eventual accrual of profits, at least predominantly, remains in the foreign country; the business activity need not be temporary, and indeed may long continue; the various entries into the United States made in the course thereof must be individually or separately of a plainly temporary nature in keeping with the existence of the two preceding considerations.

As the Foreign Affairs Manual contains provisions similar to OI 214.2(b), we are forwarding a copy of this memorandum to the Office of the Legal Advisor, Department of State, for consideration.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-29

Work Authorization for Aliens Under an Order of Supervision - 8 C.F.R. 274a.12(c)(18) (as proposed)

John R. Schroeder, Assistant Commissioner, Adjudications

CO 274A

March 12, 1991

The Office of the General Counsel has been asked by the Office of Examinations, Adjudications Branch, to render an opinion on how the Service should proceed with requests for work authorization from aliens under an order of supervision.

The Office of the General Counsel has been working closely with Office of Policy Directives and Initiatives over the past several months to get the 274a final regulations published in the Federal Register. The regulations are currently with the Office of Policy Directives and Initiatives for final review and editing. We hope the final regulation package will soon be with the Department of Justice and the Office of Management and Budget for their review and approval.

The final regulation includes a provision for aliens under an order of supervision to apply for work authorization. 8 C.F.R. 274a.12(c)(18) (as proposed). Although the Form I-765 has already been changed to reflect this addition in the regulations, there is no legal authority for the Service to implement this provision at the present time. It is always a difficult job to try to appropriately time the publication of regulations with the circulation of related forms and educational materials. In this case, the Form I-765 was changed prior to the regulations becoming final, resulting in the problem you have identified. However, until the regulations become final (90 days after publication in the Federal Register), they do not have the force of law and cannot be relied upon in any way. The mere appearance of the provision concerning work authorization for aliens under an order of supervision on the Form I-765 does not entitle an alien to this benefit, without the proper legal authority to sustain it.

In the interim, field officers should advise aliens applying for work authorization under this provision of the problem and suggest that they check with the local INS office every 30 days to see when they may apply for work authorization under this provision.

We hope this opinion is helpful to you.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-30

Legal Opinion: Effect of Legitimation after Majority On Claim to United States Citizenship under Section 303(b)

R. Michael Miller, Assistant Commissioner, Office of Adjudications

CO 301-C

March 19, 1991

I. QUESTION

You have presented the following question, following inquiries by Congresswoman Beverly B. Byron and Gilda Feldman, Attorney-Adviser, Department of State:

May a person born out of wedlock to an alien mother and a United States citizen father, and legitimated after reaching 21 years of age, be considered a United States citizen?

II. SUMMARY CONCLUSION

A person who establishes the parentage requirements of Section 303(b) of the Act may be considered a United States citizen, as Panama Law considers all children to be legitimate. Legitimation before reaching majority need not be established to meet the requirements of that section.

III. ANALYSIS

Under Section 303(b) of the Immigration and Nationality Act (Act), 8 U.S.C. 1403(b), United States citizenship is accorded to Any person born in the Republic of Panama on or after February 26, 1904, and whether before or after the effective date of this Act, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States employed by the Government of the United States or by the Panama Railroad Company, or its successor in title, is declared to be a citizen of the United States.

Section 101(c)(1) of the Act definition of "child" (which defines as a child a person under 21 years of age) has no application to Section 303(b) because the provision extends to a "person" not a "child." However, INS has interpreted Section 303(b) to require legitimation by the father in accordance with the law of the father's domicile and legitimation may occur at any time, even after the person reaches the age of majority. INS Interpretations 303.1(b)(2).

According to the Department of State and Library of Congress, Panama has codified articles 56, 57, 59, and 62 of the 1946 Panamanian constitution (CONSTITUCION POLITICA art. 56, 57, 59, 62 (Pan.)), which state in effect that all children are deemed to be legitimate from birth. Accordingly, if the person in question establishes that she was born in Panama after February 26, 1904, and that her father was a United States citizen employed by the United States Government or the Panama Railroad Company, or its successor, she should be considered a United States citizen. The Interpretations should be changed to reflect the Panamanian law.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-31

OPINION: Eligibility of Foreign Medical Graduates for Admission as H-1 Nonimmigrants

James A. Puleo, Associate Commissioner

March 20, 1991

QUESTION:

You have asked whether physicians who are foreign medical graduates may now be admitted as H-1 nonimmigrants, following the amendment to Section 101(a)(15)(H) of the Immigration and Nationality Act (Act) by the Immigration Act of 1990 (IMMACT).

CONCLUSION:

The IMMACT deleted the restriction to the admission of foreign medical graduates as H-1B nonimmigrants. Therefore, such aliens may be admitted as H-1B nonimmigrants, if they are otherwise admissible.

ANALYSIS:

In the "Health Professions Educational Assistance Act of 1976," Public Law 94-484, Congress enacted provisions to protect the availability of high quality health care in America. In Section 2 of that Act, Congress declared its finding that there was no longer an insufficient number of physicians and surgeons in the United States and there was no further need for affording preference to alien physicians and surgeons in admission to the United States under the Act.

In Title VI of the 1976 Act, Congress enacted provisions for the limitation on immigration of foreign medical graduates. As part of that Title, Congress amended Section 101(a)(15)(H) to provide that: this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession.

See section (b) of Title VI.

IMMACT has substantially changed the provisions of Section 101(a)(15(H).[FN1] The H-1B category is revised to cover an alien who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in Section 214(i)(1), and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with, and had approved by, the Secretary an application under Section 212(n)(1).

The restriction to the admission of foreign medical graduates, enacted by the 1976 Act has been stricken. There is no other provision in the 1976 Act addressing the restriction. Accordingly, the view of this Office is that foreign medical graduates may be admitted as H-1B nonimmigrants, if they are otherwise admissible.

/s/ Paul W. Virtue

Acting

Genco Opinion 91-32

Spanish Language Public Service Television Programming

Ricardo Inzunza, Deputy Commissioner, Isaiah Russell Outreach Programs

CO 1804

CO 1804

March 20, 1991

I. ISSUE PRESENTED

Can the Immigration and Naturalization Service (INS) cooperate with an independent producer in the latter's production of Spanish language programming designed, among other things, to communicate information about INS programs to the Hispanic community?

II. SUMMARY CONCLUSION

Yes. The provision of non-cash assistance (such as technical advice and speakers) to an independent producer of Spanish language programming for a program which will aid INS in communicating information about its programs to the Hispanic community in this country is a proper expenditure of resources authorized by INS's general appropriation.

III. FACTS

INS wishes to provide limited, non-financial assistance to an independent producer in the latter's production of a TV show which will be somewhat similar in format to a show, "Linea Abierta," which was developed by WSNS-TV in Chicago. The show will have a different name, however, and will not copy the "Linea Abierta" format exactly. This assistance will be limited to such activities as developing answers to questions the producer receives about INS programs, and furnishing speakers to address various topics relating to these INS programs. INS will have no ownership rights in the programs and will not have the authority to insist that any specific topic either be addressed or avoided. The producer will have the right to sell advertising time in connection with this programming.

IV. DISCUSSION

Since there are no statutes or regulations which either specifically prohibit or authorize the kind of assistance which INS wishes to provide here, the question is whether or not this assistance is a proper expenditure of funds from its general appropriation. The answer to that question depends on whether or not the expense is a proper one.

31 U.S.C. 1301(a) sets forth the basic test for determining whether an expenditure's purpose is proper: "[a]ppropriations shall be applied only to objects for which the appropriations were made except as otherwise provided by law." This language does not mean that each activity an agency wishes to conduct must be expressly described and authorized in its appropriation. The test is whether a given expenditure is necessary to accomplish the agency's mission as stated in its authorizing statute and the relevant appropriation statutes. 6 Comp. Gen. 619 (1927).

The concept of "necessary expenses" is not limited to ones without which the agency could not accomplish its mission, but there are definite limits. Generally the expenditure must: 1. contribute in a significant manner toward accomplishing the purpose of the appropriation; 2. not be prohibited by law; and 3. not be provided for in another appropriation.

The funds in INS's general appropriation (P.L. 101-515, 104 Stat. 2113) are provided "[f]or expenses … necessary for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration … ." Clearly, providing information to the Hispanic community concerning the availability of, and requirements for, the various INS programs is a necessary expense for the implementation of this authorization.

If there were any doubts, however, Section 406 of the Immigration Act of 1990 (P.L. 101-649, 104 Stat. 4978) would have eliminated them. It provides:In order to promote the opportunities and responsibilities of United States citizenship, the Attorney General shall broadly distribute information concerning the benefits which persons may receive under this title [8 U.S.C.] and the requirements to obtain such benefits. In carrying out this subsection, the Attorney General shall

seek the assistance of appropriate community groups, private voluntary agencies, and other relevant organizations. 8 U.S.C. 1443(h).

Because, however, the producer may realize a commercial gain from this programming, INS should be willing to provide the same degree of assistance to any other producer who demonstrates an ability and readiness to produce similar programming.

V. CONCLUSION

It is a proper expenditure of funds from INS's general appropriation to provide nonfinancial assistance to an independent producer in its production of TV shows which will aid INS in communicating information about its programs to the Hispanic community in the United States.

If you desire further assistance concerning this matter, please contact Douglas Wood (514-1260) of this office.

/s/ Paul W. Virtue

Acting

Genco Opinion 91-33

Legal Opinion: Modification Of Social Security Card to Require Presentation With INS-Issued Document

Edward J. Lynch, Special Assistant for Policy Development

CO 274A, 274B

March 21, 1991

I. ISSUE

Can the Social Security Administration (SSA) include a legend on Social Security Account Number cards (SSAN cards) issued to aliens with temporary work authorization stating that the SSAN card is valid for purposes of employment verification only if it is presented with a work authorization document issued by the Immigration and Naturalization Service (INS)?

II. SUMMARY CONCLUSION

Such a legend is impermissible in light of the recently-enacted Section 535 of the Immigration Act of 1990 (IMMACT), which makes it an unfair immigration-related employment practice for a person or entity to require different or more documents than those set forth at Section 274A(b) of the Act in the hiring of individuals. Since SSAN cards are, standing alone, acceptable evidence of employment authorization, requiring the presentation of another document in conjunction with the SSAN card is violative of this statutory provision.

III. LEGAL ANALYSIS

As a result of discussions at a recent INS/SSA working group meeting, the issue has arisen as to the propriety of placing a legend on the SSAN cards issued to aliens with temporary work authorization. This legend would state that in or-

der to suffice for purposes of the employment verification system established under Section 274A(b) of the Act, the SSAN card would have to be presented to an employer in conjunction with an INS-issued work authorization document. The stated purpose of this legend would be to close the current loophole by which aliens obtain unrestricted SSAN cards, and then have acceptable, unlimited documentation permitting them to obtain employment even after the period of their work authorization granted by INS has expired.

Section 535 of IMMACT, to be included at Section 274B(a)(6) of the Act, states as follows:For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of Section 274A(b) [the employment verification system], for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

Section 274A(b)(1)(C)(i) of the Act provides that a "social security account number card (other than a card which specifies on the face that the issuance of the card does not authorize employment in the United States)" is an acceptable document to evidence employment eligibility. Requiring that an alien present an INS-issued document concurrently with a SSAN card is contrary to both what is currently an acceptable employment eligibility document and violative of the anti-discrimination provisions of the Act, as amended.

The inclusion of a legend on the SSAN card also triggers other sections of the Act. When the employer sanctions provisions were added to the Act by the passage of the Immigration Reform and Control Act of 1986 (IRCA), limitations on modifications to the employment verification system were created. Specifically, Section 274A(d)(3)(D) of the Act defines "any change in any card used for accounting purposes under the Social Security Act" as a "major" change, thereby implicating one year prior notification to Congress of the proposed change, Section 274A(d)(3)(A)(ii) of the Act, and Congressional review. Section 274A(d)(3)(C) of the Act.

Some ambiguity exists as to whether the proposed legend would in fact constitute a "major" change. Resort to legislative history is instructive. The conference substitute requires the President to provide one year's notice to Congress before instituting any change in the social security card (including a requirement that current social security cards be universally used for employment authorization), and requires Congress to specifically appropriate funds for any such change.

H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 90 (1986)(emphasis supplied). Although the legend under consideration is not directly analogous to a requirement that the SSAN card be "universally used for employment authorization", the legend does constitute a change from the present SSAN card so as to qualify as a "major" change under the Act. Therefore, the one year notification provisions to Congress would be effective.

If you need further assistance on this matter, please contact Michael C. McGoings, Associate General Counsel, at 514-1260.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-34

Legal Opinion: Use of Border Patrol Vehicles in film

Verne Jervis, Director, Public Affairs

CO 659

March 27, 1991

I. QUESTION

A. Can the Immigration and Naturalization Service provide a Border Patrol van and four wheel drive truck, operated by an off-duty volunteer, but uniformed Border Patrol Agent, for two days of filming by a private filmmaker?

B. Can the INS provide technical assistance to a private filmmaker?

II. SUMMARY

A. Yes. There is no legal prohibition disallowing the use of government vehicles in the manner described, for the purposes stated. However, it is the policy of the Department of Justice to have all such requests, including those of INS, cleared and approved directly by the Department's Office of Public Affairs. Uniformed Border Patrol Agents may appear on a volunteer basis if by doing so they further the mission of the Agency and if their actions are consistent with the Standards of Conduct[FN1] for Federal employees.

B. Yes. The INS may legally provide free technical assistance to private filmmakers as long as the information provided is otherwise available to the public.

III. ANALYSIS

Background. — of the Tisch School of the Arts, Institute of Film and Television, Graduate Program, New York University, has formally requested technical assistance from the U.S. Border Patrol for the production of his film, "La Linea." He has also requested that he be allowed to film volunteer, off-duty Border Patrol Agents operating a Border Patrol van and four wheel drive truck for a duration of two days. The filming is currently scheduled for a two-week period in June 1991, in San Ysidro, California. The Border Patrol has reviewed the script presented to them by Mr. —, and is willing to cooperate with his request. There will be no money changing hands.

Use of Agency Vehicles. Government-owned vehicles can only be used to further the mission of the Government. If allowing a student movie producer to film a Border Patrol vehicle for two days in order to "shed a sympathetic light" on immigration problems in the southwest will further the mission of the agency, there is otherwise no legal prohibition. It is our understanding that the Border Patrol, having read the agency's script, has determined that the film will further the agency's mission, and is willing to cooperate in this respect.

Prior to authorizing the use of the agency's vehicles by private filmmakers, an agency within the Department of Justice must obtain the approval of the Departmental Office of Public Affairs. The Departmental contact at this time is Public Affairs Specialist Gina Talamona, 514-2007. Ms. Talamona was contacted by this office and has approved this project.

Technical Advice. The Border Patrol may provide the technical advice requested by Mr. —. However, that advice is limited to information which has become "part of the body of public information."[FN2]

Use of Border Patrol Volunteers. It is our understanding that those Border Patrol Agents "acting" in this film will be volunteers and "off-duty." As employees of the Department of Justice, they must at all times "conduct themselves in a manner that creates and maintains respect for the Department of Justice and the U.S. Government." This rule applies as well to their conduct in the movie.

Janis A. Sposato, General Counsel, Justice Management Division, was consulted prior to the preparation of this opinion. If further information is required on this matter, please feel free to contact Sandra B. March, Assistant General Counsel, of this office at 514-1260.

/s/ Paul W. Virtue

Acting

FN??3. 28 CFR 5.735-2.

Genco Opinion 91-35

Legal Opinion: INS Lease-Purchase Authority Concerning Detention Facilities

James A. Kennedy, Assistant Commissioner, Administration

CO 819

March 27, 1991

I. ISSUE PRESENTED

Does the Immigration and Naturalization Service (INS) have 20-year lease purchase authority for detention facilities?

II. SUMMARY CONCLUSION

No. Except in limited circumstances not applicable here, INS has no inherent lease-purchase authority, and therefore cannot enter into such a transaction without a specific delegation of authority from the General Services Administration (GSA).

III. FACTS

The Southern Regional Office of Facilities Management has requested permission to advertise and prepare a Solicitation for Offers to proceed with a 20-year lease purchase agreement to provide a detention facility in Houston, Texas.

IV. DISCUSSION

40 U.S.C. 490(h)(1) authorizes the Administrator of GSA "to enter into lease agreements with any person, copartnership, corporation, or other public or private entity, which do not bind the Government for periods in excess of twenty years for each such lease agreement. … " Absent an express statutory grant of authority, other federal agencies must have a specific delegation of authority from GSA to enter into such an agreement. There is no indication that INS has applied for a specific delegation in this matter, and, as explained below, we do not believe that Congress has made a statutory grant of such authority to INS.

GSA has made some permanent delegations in 41 C.F.R. Part 101-18, but none of those delegations are applicable here. Thus, the only means by which INS could acquire the authority to enter into a 20-year lease or lease-purchase would be to request and receive a specific delegation of authority from the Administrator of GSA under 41 C.F.R. 101-18.104(b). As you note, however, the Office of Management and Budget (OMB) has recently been disapproving all GSA lease-purchase proposals. We have discussed this matter with a representative of GSA, who informed us that GSA, while it believes that it has independent authority under the Federal Property Management Regulations to enter into lease-purchase agreements, has suspended all such activity until it receives a response from OMB to an inquiry concerning this authority. Thus, it appears virtually certain that GSA would not approve any request for a delegation of lease-

purchase authority at this time.

Your memorandum states that 8 U.S.C. 1252 "grants INS the authority to acquire land and to erect, acquire, maintain, and operate buildings necessary for the detention of aliens." This statute is an authorization to expend funds "from the appropriation for the administration and enforcement of the immigration laws," but it is not authority to acquire property by lease, or lease-purchase, without a delegation from GSA.

V. CONCLUSION

In order to proceed with the Solicitation of Offers described above, INS would have to request and receive a specific delegation of authority from the Administrator of GSA pursuant to 41 C.F.R. 101-18.104(b). As explained above, it is unlikely that GSA would make such a delegation at this time. You could, however, as an alternative, request a delegation simply to enter into a 20-year lease and then take up the purchase aspect of the transaction once OMB and GSA have settled their differences.

If you have further questions on this matter, please contact Douglas Wood (514-1260).

/s/ Paul W. Virtue

Acting

Genco Opinion 91-36

Legal Opinion AUTHORITY OF INS OFFICERS TO ASSIST STATE ENFORCEMENT OPERATIONS

G.H. Kleinknecht, Associate Commissioner, Enforcement

CO 287.2

April 8, 1991

Attn: Jack Shaw

ISSUE

To what extent may INS officers assist state and local enforcement officials in executing their criminal or administrative warrants?

SUMMARY CONCLUSION

Depending upon state law, INS officers may exercise authority as "peace officers" to assist in the execution of state warrants, in matters that relate to their official duties under the Immigration and Nationality Act (Act). Pursuant to Departmental policy, they are encouraged to cooperate with state and local officials who notify INS of suspected violations of immigration laws, and may act upon evidence of an offense cognizable under the Act that is discovered in plain view during a lawful search, even if the evidence relates to an offense other than the one for which a person was searched or arrested. However, state and local warrants may not be used to circumvent INS guidelines on participation in enforcement operations or as a subterfuge to aid only INS enforcement efforts. Likewise, INS officers may not make an immig-

ration arrest as a subterfuge for the purpose of considering what state charges to bring.

ANALYSIS

A. PERTINENT INS POLICIES AND STATUTORY PROVISIONS:

The Department of Justice Guidelines on Cooperative Efforts Between the INS and Other Law Enforcement Agencies, dated March 2, 1988, provides: It is Departmental policy for the INS to cooperate with federal, state and local law enforcement officers who notify the INS of suspected violations of the immigration laws, or who seek INS assistance in the investigation and detection of serious criminal offenses involving aliens. After criminal processing, the status of these aliens will be reviewed, and they will be processed for removal when statutorily permissible … INS agents and officers of other jurisdictions at all levels of government are encouraged to engage in joint operations and task force efforts directed at uncovering significant criminal activities which involve aliens and/or violations of the criminal laws. Within the scope of these efforts, INS agents will remain responsible for all arrests for immigration violations … These agents will, however, make arrests for non-immigration offenses only to the extent that other laws permit them to do so as federal agents, designated state peace officers or private citizens.

Section 287(a)(1) of the Act provides INS officers with broad authority to interrogate "any alien or person believed to be an alien as to his right to be or to remain in the United States." While there is no requirement that the officer must have probable cause for such an inquiry, Matter of Perez-Lopez, 14 I&N Dec. 79 (BIA 1972) (anonymous tip), such interrogations generally must be supported by reasonable suspicion that the person interrogated is an alien. U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975).

Likewise, an INS officer may make arrests, without warrant, for felonies which are cognizable under the Act if he has reason to believe that the person so arrested is guilty of such felony and if there is a likelihood of the person escaping before a warrant can be obtained. Such person must be taken without unnecessary delay to the nearest available "officer empowered to commit persons charged with offenses against the laws of the United States" (e.g. U.S. magistrate) under Section 287(a)(4) of the Act. INS officers may execute warrants of arrest, Id, 8 C.F.R. 242.2(c), conduct searches without warrant of persons arriving in the United States pursuant to Section 287(c) of the Act, 8 U.S.C. 1357(c), and inspect and take testimony under oath of any person coming into the United States to determine whether they belong to any of the excludable categories in Section 212 of the Act.

In a Department of Justice Release dated November 26, 1979, the Department concluded that private dwellings must be afforded the most stringent Fourth Amendment protection. Investigations at places of residence by immigration officers were discontinued as a usual enforcement technique. Employment-related enforcement thereafter has been the primary investigative activity of INS, except in unusual circumstances such as smuggling operations centered in a resident location, threats of physical harm to illegal aliens, resident aliens and citizens, fugitives misusing a residence for concealment, instances of flagrant abuse of immigration law and other exceptional circumstances. See Payton v. New York, 445 U.S. 573 (1980).

Under Section 503 of the Immigration Act of 1990 (IMMACT), arrest authority of INS officers has been broadened to apply to non-immigration related crimes against the United States. Thus, if an officer or employee is performing duties relating to the enforcement of the immigration laws at the time of arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest, he or she may make arrests without warrant 1) for any offense against the United States, if the offense is committed in the officer's or employee's presence; or 2) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony. In the latter case, the officer must have first received the requisite training and certification. Section 287(a)(5) of the Act. This "general arrest authority" applies only to violations of federal, not state law.

In a number of states, INS officers have the authority as "peace officers" to assist in the execution of state warrants in matters that clearly relate to their special duties defined by the Immigration and Nationality Act. The search conducted must comply with the scope of the search warrant.

B. PERTINENT CASELAW:

In Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989), a local fire marshal lawfully present at a site to investigate a fire called a United States Secret Service agent who seized crucial evidence without procuring a search warrant. The Fifth Circuit rationalized the lawfulness of coordination between state and federal officials:The purpose of a search warrant is to ensure judicial authorization, in advance, of intrusions into constitutionally protected privacy. Where a lawful intrusion has already occurred and a seizure by a State officer has validly taken place as a result of that intrusion, the invasion of privacy is not increased by an additional officer, albeit a federal officer, who is expert in identifying the type of contraband discovered, to enter the premises to confirm the belief of the State officer and to take custody of the evidence. Once the privacy of a dwelling has been lawfully invaded, to require a second officer from another law enforcement agency arriving on the scene of a valid seizure to secure a warrant before he enters the premises to confirm that the seized evidence is contraband and to take custody of it is just as senseless as requiring an officer to interrupt a lawful search to stop and procure a warrant for evidence he has already inadvertently found and seized. Terry v. Ohio, 392 U.S. 1 (1968). The apparent conflict between the constitution and common sense which the plain view doctrine has reconciled is the same misconception which we here seek to dispel. See Mapp v. Ohio, 367 U.S. 643, 647 (1961).

Thus, assuming that the warrant is executed in good faith by State and local officials, it is in the interests of law abiding citizens that the fruits of the warrant not be disregarded by INS officers charged with enforcing the immigration laws. However, it is improper for INS officers to make an immigration arrest as a subterfuge for the purpose of aiding other law enforcement officers to avoid the judicial warrant procedure rather than in good faith to enforce the immigration law. See Abel v. U.S., 362 U.S. 217 (1960) (FBI seizure incidental to INS arrest; held, evidence here supports finding of good faith INS execution of warrant). A person "is most likely to convince a court that bad faith was present if he can show that officers with enforcement interests and responsibilities unrelated to the crime for which the search warrant was issued participated in the search." WAYNE R. LAFAVE, SEARCH AND SEIZURE 4.11 at 357 (2d ed. 1987).

When an article subject to lawful seizure comes into an officer's possession in the course of a lawful search it would be entirely without reason to say he must return it because it was not one of the things it was his business to look for. U.S. v. Alvarado, 321 F.2d 336 (2d Cir. 1963). See U.S. v. Johnson, 707 F.2d 317 (8th Cir. 1983) where police obtained a warrant for drugs and asked ATF to assist. The court held that there was no "subterfuge", as there was no indication that the state warrant was not obtained in good faith and the mere fact of state-federal cooperation or a strong suspicion of firearms being present did not prove subterfuge. See also U.S. v. Kimberlin, 805 F2 210 (7th Cir 1986). In U.S. v. Washington, 797 F.2d 1461 (9th Cir. 1986) the court held that although state police executing a warrant for drugs were accompanied by FBI agents interested in a prostitution ring, this was not an invalid pretext warrant because the "purpose, not inducement, is the relevant inquiry" and the state search for drugs "'was a serious, valid investigation.'" See, generally, WAYNE R. LAFAVE, SEARCH AND SEIZURE 4.11 (2d ed. 1987).

On June 4, 1990, the Supreme Court held that the Fourth Amendment does not prohibit the warrantless seizure of evidence in plain view even though the discovery of the evidence was "not inadvertent." Horton v. California, 58 U.S.L.W. 4697 (U.S. June 4, 1990). According to the Court, "if [an officer] has a valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first." 58 U.S.L.W. 4697.

Finally, when a person has been lawfully arrested and is in custody, a complete search may be made of his person pursuant to the arrest. Chimel v. California, 395 U.S. 752 (1969). Such a search, even though made without a search warrant, does not violate the person's Fourth Amendment rights. U.S. v. Robinson, 414 U.S. 218 (1973). The purpose of this

type of search is two-fold: First, it is performed to protect the officer and others and to insure that the prisoner retains no means for escape, and second, it is made to prevent the destruction of evidence of the offense for which the subject was arrested. Abel v. U.S., supra; Chambers v. Maroney, 399 U.S. 42 (1970). It is proper to seize evidence of the commission of any crime or offense when it is discovered in the course of a lawful search, even if it is evidence of an offense other than the one for which the person was arrested. U.S. v. Nevarez-Alcanter, 495 F.2d 678 (10th Cir.), cert. denied, 419 U.S. 878 (1974). U.S. v. Alvarado, 321 F.2d 336 (2d Cir. 1963). Thus, INS officers may act upon evidence of illegal presence in the United States found on an alien incident to an arrest made pursuant to a good faith execution of the state warrant and presented to INS by the arresting officials during a joint operation.

C. CONCLUSION:

To avoid the appearance of subterfuge, INS officers should not direct, propose, or request that state or local enforcement operations be carried out when these operations will be beneficial only to INS. Joint operations should not be conducted unless there are independent and articulable facts which clearly indicate that the involvement of both INS and another law enforcement entity is warranted. A strong interest or suspicion, even if it approaches probable cause, does not prove subterfuge. Accompanying INS officers should look at and adhere to the state warrant. Finally, INS officers should not make an immigration arrest as a subterfuge for the purpose of considering what state charges to bring.

Should you have questions regarding this matter, please contact William Joyce, Associate General Counsel, or Kim Bingham, Assistant General Counsel, at FTS 368-2895.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-37

Legal Opinion: Whether a certain alien has effected an entry for immigration purposes

Michael D. Cronin, Asst. Commissioner, Inspections

CO 212-C

April 9, 1991

I. QUESTION PRESENTED

Whether, in the light of the following facts, the alien in question has effected an "entry" into the United States based on the fact that he was removed from the federal inspections facility for prosecution? An alien arrived at a port of entry where he was inspected by an immigration inspector and admitted into the United States. The passport was stamped to indicate such admission. The alien proceeded to the United States Customs inspection area where a customs inspector found a substantial amount of a controlled substance in the alien's luggage. The Drug Enforcement Administration arrested the alien, removed the alien to a federal detention facility, and subsequently successfully prosecuted the alien for possession of the controlled substance. The Service must now decide whether to place the alien in exclusion or deportation proceedings.

II. SUMMARY CONCLUSION

The alien has not effected an "entry" because, although he was removed from the federal inspections enclosure, he was never free from official restraint. Therefore, the alien should be placed in exclusion proceedings.

III. ANALYSIS

We have reviewed the case law on the subject of an "entry" for immigration purposes. Case law has made it clear that an alien does not effect an "entry" into the United States for immigration purposes unless all of the following elements are present: (1) the alien is physically present in the territory of the United States; (2) the alien has been inspected and admitted for immigration purposes or the alien has actually and intentionally evaded inspection; and (3) the alien is free from official restraint. Correa v. Thornburgh, 901 F.2d 1166 (2d Cir. 1990); In re Dubbiosi, 191 F. Supp. 65 (E.D. Va. 1961); Matter of Pierre, 14 I&N Dec. 467 (BIA 1973).

Physical presence along with an immigration inspection and admission alone do not constitute an "entry" if the alien is still awaiting formal disposition of the request for entry by all other inspectional entities concerned. See United States v. Vasilatos, 209 F.2d 195 (3d Cir. 1954). Therefore, even if the immigration inspector admits the alien and stamps the passport, the alien is still subject to inspection by any and all government agencies while the alien remains in the federal inspections enclosure. Consequently, the alien has not made an entry until he or she has cleared all the inspections stations and is permitted to depart from the federal inspections facility under no restraint whatsoever. If the alien remains under constraint by any government agency the alien has not effected an entry. Lazarescu v. United States, 199 F.2d 898, 900 (4th Cir. 1952); Vasilatos, supra, at 197.

Based on the discussion above, we must conclude that the alien described in the facts provided has not effected an entry into the United States. Although the alien was physically present in the United States and was inspected and admitted by the Service officer, the alien was never free from official restraint. Although the alien was removed from the federal inspections facility, such removal was under the official restraint of the United States government, i.e., the DEA. Consequently, proper procedure requires that the alien be placed in exclusion proceedings.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-38

Legal Opinion: Your memorandum of March 27, 1991 regarding —; waiver under Section 212(c)

William L. Bryan, Officer in Charge, Frankfurt, Germany

CO 212.29-P

April 29, 1991

Through: Luis R. Del Rio, Director, COFOR

Attention: Silma Dimmel, European Desk Officer

QUESTIONS

You have asked

whether the United States Government has the legal obligation to accept the return of the subject alien, —, upon the completion of his prison sentence in Germany, and

whether the Immigration and Naturalization Service is liable for continuing his custody in prison past the March 13, 1991, date of planned release from prison pending receipt of conviction documents with an English translation.

SUMMARY CONCLUSIONS

The United States Government is not obligated to accept the return of Mirlas unless he is admissible to the United States under the Immigration and Nationality Act, retains the status of a lawful permanent resident, and establishes that he is returning from a temporary visit abroad. If Mirlas is excludable, as he appears to be, a visa would have to be denied unless a waiver of excludability under Section 212(c) of the Immigration and Nationality Act were granted. The decision on the waiver must be made by the district director in charge of the area in which the applicant's intended or actual place of residence in the United States is located.

It appears to us that German law governs the subject alien's custody, whether pursuant to German criminal law or German immigration law.

DISCUSSION

Facts

According to your memorandum, the subject alien, —, is a stateless native of the U.S.S.R. Your memorandum states that he married a United States citizen in 1973.[FN4] He was paroled into the United States as a refugee under the Act of October 5, 1978, Public Law 95-412. At that time he claimed to have one son, —, born on September 5, 1973, in the U.S.S.R. — became a lawful permanent resident as of January 16, 1979. He was divorced in 1982.

According to your memorandum, — has one United States citizen son, 15 years old,[FN5] and alleged he is currently paying child support in the amount of $10,000.00 per year. He claimed he was a pianist, later became involved in real estate and owned a night club and restaurant, and had a monthly income of $20,000.00.

On July 12, 1988, — was issued a reentry permit valid until July 11, 1990, at Newark, New Jersey, the district of his claimed residence. He claimed he entered the Federal Republic of Germany on August 7, 1988, as a visitor and was arrested on August 8, 1988, as an accomplice, for trafficking in cocaine, 93% pure, 990 grams, at a street value of approximately $70,000.00. He was convicted on April 17, 1989, and sentenced to four years in prison. On March 13, 1991, he was due to be released.

The German Ministry of Justice and — himself are requesting authorization for his return to the United States. —'s attorney requests such authorization in writing.

Must Obtain a Visa Before He May Return to the United States

Generally, any alien applying to enter the United States as an immigrant must have a valid unexpired immigrant visa. Immigration and Nationality Act (INA), 211(a); 8 C.F.R. 211.1(a).

An alien registration receipt card may be presented in lieu of an immigrant visa by an immigrant alien who is returning to an unrelinquished lawful permanent residence in the United States if he is returning after a temporary absence abroad of not more than one year. INA, 211(b); 8 C.F.R. 211.1(b)(1)(A); 22 C.F.R. 42.1(a). After one year the alien registration receipt card is considered expired. 8 C.F.R. 211.3.

A valid unexpired reentry permit may be presented in lieu of an immigrant visa by an immigrant alien who is return-

ing to an unrelinquished lawful permanent residence in the United States if he is returning after a temporary absence abroad and embarked or enplaned before the expiration of the reentry permit. A reentry permit may not be valid for more than two years and is not renewable. INA, 223; 8 C.F.R. 211.3, 223; 22 C.F.R. 42.1(a).

An alien, previously admitted as a lawful permanent resident, who is seeking to enter the United States as a returning immigrant but who does not have a valid unexpired alien registration receipt card or reentry permit, must seek a visa under the classification of special immigrant (returning resident): "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad[.]" INA, 101(a)(27)(A), 221, 224. He must satisfy the consular officer that:

(1) The alien had the status of an alien lawfully admitted for permanent residence at the time of departure from the United States;

(2) The alien departed from the United States with the intention of returning and has not abandoned this intention; and

(3) The alien is returning to the United States from a temporary visit abroad and, if the stay abroad was protracted, this was caused by reasons beyond the alien's control and for which the alien was not responsible.

22 C.F.R. 42.22(a).

In this case, — has been abroad for more than two years. Therefore, he may not present his alien registration card or his reentry permit in lieu of an immigrant visa, since both have expired. INA, 223; 8 C.F.R. 211.3, 223; 22 C.F.R. 42.1(a). In addition, he may have difficulty satisfying the consular officer that his protracted stay abroad was caused by reasons beyond his control and for which he was not responsible. On the one hand, once he was detained by the German authorities, he was not free to leave Germany and return to the United States. On the other hand, it appears that his unlawful actions resulted in the conviction and imprisonment that caused him to be absent from the United States beyond the expiration date of his reentry permit.

However, the requirement that needs to be satisfied is that the visit abroad be temporary, and that the alien not have abandoned his residence in the United States. This question is generally resolved by examining the intent of the alien at the time of his departure and during his absence. Matter of Kane, 15 I&N Dec. 278 (BIA 1975).

It has been held

> that a permanent resident returns from a "temporary visit abroad" only when (a) the permanent resident's visit is for "a period relatively short, fixed by some early event," or (b) the permanent resident's visit will terminate upon the occurrence of an event having a reasonable possibility of occurring within a relatively short period of time. If as in (b), the length of the visit is contingent upon the occurrence of an event and is not fixed in time and if the event does not occur within a relatively short period of time, the visit will be considered a "temporary visit abroad" only if the alien has a continuing, uninterrupted intention to return to the United States during the entirety of his visit. Some of the factors that could be used to determine whether an alien harbored a continuous, uninterrupted intention to return in addition to the alien's testimony include the alien's family ties, property holdings, and business affiliations within the United States, the duration of the alien's residence in the United States, and the alien's family, property and business ties in the foreign country … . [It may also be considered whether] the alien's conduct while outside of the United States constitutes an affirmative indication that he intends to remain in the foreign country. The alien, for example, might have acquired substantial or permanent ties to the foreign country after leaving the United States, or instead, the resident immigrant may have been persistent in his retaining his status by conferring with American officials during his visit.

Chavez-Ramirez v. INS, 792 F.2d 932, 936–37 (9th Cir. 1986). See also, Matter of Kane, supra.

In this case, no facts have been stated regarding the alien's purpose in traveling abroad. However, he may be able to establish that, at the time of departure from the United States and all during his absence, he intended his visit abroad to

be temporary, always maintained his intent to return to the United States, and did not take any actions tending to show that he intended to abandon his United States residence. In that case, he must establish his eligibility to receive a visa under Section 212 of the Immigration and Nationality Act or any other provision of law or regulation. 22 C.F.R. 40.6.

If, As It Appears, Is Excludable from the United States, He Must Obtain a Waiver of Excludability Before a Visa May Be Granted

It appears that — is excludable under Section 212(a)(23)(A) and/or (B) of the INA, as an alien who

(A) has been convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)); or

(B) the consular officers or immigration officers know or have reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assistor, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance[.]

If the consular officer refuses the visa, he must inform the applicant of the provision of law or implementing regulation on which the refusal is based and of any statutory provisions under which administrative relief is available. 22 C.F.R. 42.81(b). In this case, the only form of relief for which the alien might be eligible is a waiver of excludability under Section 212(c) of the Act. He is not barred from this relief under sections 511 and 601(d), Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, as an aggravated felon because he did not commit the crime on or after November 29, 1990, and he has not served a term of imprisonment of at least five years.

Before suggesting that the applicant apply for a Section 212(c) waiver, the consular officer must be satisfied that the alien is eligible under that section. Foreign Affairs Manual (FAM), 42.22, N6. An application for this waiver must be submitted to the district director in charge of the area in which the applicant's intended or actual place of residence in the United States is located. 8 C.F.R. 212.3(a); FAM 42.22, PN2. That district director must decide whether the applicant is eligible for relief under Section 212(c) and whether discretion should be exercised in his behalf. INA 212(c); 8 C.F.R. 212.3(b).

We Need More Information on Your Question Regarding Liability

We are not aware that INS has any authority or power to require a foreign government to continue in confinement a person whom that government would otherwise release. To our knowledge, we have no treaty or other arrangement with Germany that would require that country to honor any such request, if it were made. It would be a matter of German law and policy whether to continue the custody of an alien who has served a prison sentence, pending the conclusion of arrangements to remove him from the country. We have no information regarding whether — has had or is entitled to deportation or exclusion proceedings under German law.

/s/ Paul W. Virtue

Acting

Genco Opinion 91-39

Legal Opinion: Penalties for misrepresentations by an unauthorized alien on an Employment Eligibility Verification Form (Form I-9)

Paul Stultz, District Counsel, Omaha, NE

CO 212.13-C

CO 274A-C

April 30, 1991

I. QUESTION

Whether an alien who misrepresents his or her citizenship or immigration status or presents counterfeit documents in completing INS Employment Eligibility Verification Form, Form I-9, is subject to exclusion from the United States under Section 212(a)(19) of the Immigration and Nationality Act (Act)?

II. SUMMARY CONCLUSION

Misrepresentations made to an employer in completing a Form I-9 are not statements made to a United States government official authorized to grant visas or other benefits under the Act and therefore cannot form the basis for the exclusion of an alien under Section 212(a)(19) of the Act. The same holds true for presentation of counterfeit documents.

These actions, however, do render an alien subject to criminal prosecution. Also, the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, provides for assessment of civil administrative penalties against persons or entities who fraudulently complete Forms I-9 or who present or accept fraudulent documents in conjunction with Forms I-9. Beginning June 1, 1991, an alien subject to a final order assessing such a penalty is ineligible for adjustment of status and subject to exclusion.

III. ANALYSIS

A. An Alien's False Statements or Presentation of False Documents in Completing a Form I-9 Does Not Render the Alien Excludable under Ina Section 212(a)(19)

Any alien "who, by fraud or willfully misrepresenting a material fact, seeks to procure, or has sought to procure or has procured a visa, other documentation, or entry into the United States or other benefit provided under this Act" is ineligible to receive a visa and shall be excluded from admission into the United States. INA 212(a)(19), 8 U.S.C. 1182(a)(19). To find an alien excludable under the provisions of Section 212(a)(19) of the Act, an immigration judge must determine that: (1) there has been a misrepresentation made by the applicant; (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. In the Matter of M—, 6 I&N Dec. 149 (1954); Matter of L-L-, 9 I&N Dec. 324 (1961).

The terms "willful," "misrepresentation," and "material" are strictly defined for purposes of Section 212(a)(19) of the Act. A misrepresentation is an assertion or manifestation not in accordance with the facts. Misrepresentations can be made in oral interviews, written applications, or by submitting evidence containing false information. For a misrepresentation to fall within the purview of Section 212(a)(19) of the Act, however, the alien must have made the misrepresentation before an official of the United States Government; generally speaking, a consular officer or an INS officer. Matter of L-L-, 9 I&N Dec. 324 (1961). Furthermore, a false statement or misrepresentation must be made to obtain some benefit under the INA in order for the false statement to render an alien excludable. FAM Note 7.2 to 22 CFR 40.7(a)(19), TL:VISA-4 (November 19,1987).

This inquiry concerns the use of the Employment Eligibility Verification Form (Form I-9), which is used in connec-

tion with the enforcement of Section 274A of the Act. For two reasons, we conclude that an alien's false statements on Form I-9 do not render the alien subject to exclusion under Section 212(a)(19) of the Act. First, an alien who falsifies a Form I-9 does not make the false statements before a United States government official authorized to grant visas or other immigration benefits. Secondly, while the decision of the Service to grant an alien authority to accept employment is a benefit under the INA, an employer's decision to hire any particular individual involves a private employment contract. Thus, false statements on Form I-9 are not for the purpose of obtaining a benefit under the INA and, therefore, cannot form the basis for exclusion of an alien pursuant to Section 212(a)(19) of the Act.

B. The Law Provides Sanctions, other than Exclusion under Section 212(a)(19), for Aliens Who Make False Statements on Forms I-9

An alien's false statements in completing Form I-9 do not render him or her excludable from the United States under Section 212(a)(19) of the Act. There are other sanctions, however, which the Service may seek to impose on aliens who falsify Forms I-9. A prospective employee attests to the accuracy of the information he or she provides on Form I-9 under penalty of perjury. The law provides that:

> (b) Whoever uses—
>
> (1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,
>
> (2) an identification document knowing (or having reason to know) that the document is false, or
>
> (3) a false attestation, for the purpose of satisfying a requirement of Section 274A(b) of the Immigration and Nationality Act, shall be fined in accordance with this title, or imprisoned not more than two years, or both.

18 U.S.C. 1546(b). Furthermore, an alien convicted under Section 1546 is subject to deportation from the United States. INA 241(a)(3)(B)(iii), 8 U.S.C. 1251(a)(3)(B)(iii), as amended by Immigration Act of 1990 ("1990 Act"), Pub. L. No. 101-649, 602(a), 104 Stat. 4978, 5077, 5081 (1990).

The 1990 Act provides additional sanctions. Section 544(a) of the 1990 Act amends the Immigration and Nationality Act, as amended, by adding new Section 274C. 1990 Act, 544(a), 104 Stat. at 5059. This new Section 274C provides for civil administrative penalties against persons or entities engaging in immigration-related document fraud. INA 274C(d)(3), 8 U.S.C. 1324c(d)(3). The penalties are in effect for violations committed on or after November 29, 1990. 1990 Act, Pub. L. No. 101-649, 544(c), 104 Stat. at 5061.[FN1]

New Section 274C makes it unlawful for a person or entity knowingly to:

— forge, counterfeit, alter or falsely make any document;

— use, attempt to use, possess, obtain, accept or receive any forged, counterfeit, altered or falsely made document;

— use or attempt to use any document lawfully issued to a person other than the possessor (including a deceased individual);

for the purpose of or in order to satisfy any requirement of the INA. INA 274C(a)(1) through (3), 8 U.S.C. 1324c(a)(1) through (3). It is also unlawful knowingly to accept or receive any document lawfully issued to a person other than the possessor (including a deceased individual) for the purpose of complying with Section 274A(b) of the Act. Id. 274C(a)(4), 8 U.S.C. 1324c(a)(4). As noted above, employment, as contrasted with employment authorization, is not a benefit under the INA. Attesting to one's citizenship or immigration status and presenting evidence of identity and employment authorization, however, are requirements of the INA. Id. 274A(b)(2), 8 U.S.C. 1324a(b)(2). Thus, civil penalties under Section 274C may be assessed against those employees who falsely complete Forms I-9 fraudulent documents in connection with the Forms I-9. Id. 274C(a) and (d)(3), 8 U.S.C. 1324c(a) and (d)(3). The penalties include a monetary

fine, as well as a "cease and desist" order. Id. The civil penalties are in addition to any criminal penalties imposed in Title 18, United States Code. Id. 274C(c), 8 U.S.C. 1324c(c).

The 1990 Act imposes an additional sanction on alien violators of Section 274C. Effective June 1, 1991, an alien subject to a final order under Section 274C would also be ineligible for admission to the United States, and for adjustment of status. See id., 601(a) (amending INA 212(a)(6)(F)) and (e) (establishing effective date), 104 Stat. at 5067, 5074 and 5077.

Congress had intended that aliens subject to final orders under Section 274C of the Act be amenable to deportation. This intent is evident from the fact that Section 544 of the 1990 Act also amended INA 241(a), 8 U.S.C. 1251(a), to provide for the arrest and deportation of an alien subject to a final order assessing a penalty for violation of Section 274C. 1990 Act, Pub. L. No. 101-649, sec. 544(b), 104 Stat. at 5061. Section 602(a) of the 1990 Act, however, enacted a comprehensive revision of Section 241(a). 1990 Act sec. 602(a), 104 Stat. at 5077. This revision of the deportation grounds became effective for deportation proceedings in which the orders to show cause are issued on or after March 1, 1991. Id. 602(d), 104 Stat. at 5082. The amended deportation statute does not carry over the deportation provision created by Section 544(b). Id. 602(a), 104 Stat. at 5077. Thus, a technical correction bill may need to be enacted to ensure that the intent of Congress that aliens subject to final orders under 274C are amendable to deportation is given full legal effect.

An alien who knowingly completes Form I-9 falsely, or who offers fraudulent documents as proof of identity, employment authorization, or both, is subject to criminal and civil penalties. An alien who is convicted under 18 U.S.C. 1546 is also amenable to deportation. Beginning June 1, 1991, an alien subject to a final order imposing civil penalties under Section 274C of the Act is ineligible for adjustment and subject to exclusion. Thus, although an alien does not become excludable under INA Section 212(a)(19) by falsifying a Form I-9, the law does provide suitable sanctions which the Service may seek to impose for this conduct.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-40

Legal Opinion: Continuing Validity of Pre-IMMACT Deportation Charge(s) on OSCs Served Before March 1, 1991.

All Regional Counsel, All District Counsel, Enforcement

May 2, 1991

ISSUE

Whether "pre-IMMACT" grounds of deportability which are charged in an Order to Show Cause served on an alien before March 1, 1991, continue to be prosecutable beyond March 1, 1991.

SUMMARY CONCLUSION

The pre-IMMACT grounds of deportability continue to be prosecutable beyond March 1, 1991 in all cases where the Order to Show Cause (OSC) charging such grounds was served upon the alien prior to March 1, 1991 by routine or personal service as prescribed by 8 C.F.R. 242.1(c). The amendments made to Section 241(a) of the Immigration and Nationality Act (Act) by Section 602 of the Immigration Act of 1990 (IMMACT) do not apply to any deportation proceed-

ings for which notice was provided to the alien prior to March 1, 1991.

DISCUSSION

Section 602 of IMMACT revises and recodifies all the grounds of deportability under Section 241(a) of the Act. The recodified grounds generally mirror the related recodified grounds of excludability under Section 212(a) of the Act. Section 544(b) of IMMACT adds a new ground of deportability based upon an Administrative Law Judge's final order for document fraud under Section 274C (pending technical amendment), and the "for gain" requirement is deleted from the smuggler ground under Section 241(a)(1)(E)(i), among other changes.

Section 602(d) of IMMACT provides that "[t]he amendments made by this section, and by Section 603(b) of this Act, shall not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991." The effect of this section is that the new recodified deportation grounds can only apply to proceedings where the OSC is provided to the alien on or after March 1, 1991. IMMACT's recodified grounds and repealing provisions do not apply where the OSC containing the old ground(s) was properly served upon the alien prior to March 1, 1991. Where notice of deportation proceedings was provided to the alien prior to March 1, 1991, the pre-IMMACT grounds charged remain in full force and effect after March 1, 1991.

This change in the law which applies only to OSCs served on or after March 1, 1991, expressly exempting deportation proceedings where OSCs were served prior thereto, distinguishes it from cases where appellate courts have applied the most recent law after a change in the law that occurred during the pendency of proceedings. See In the Matter of B-, 5 I&N Dec. 255 (BIA 1953); U.S. ex rel Wiczynski v. Shaughnessy, 185 F.2d 347 (2d Cir. 1950); U.S. ex rel. Pizzuto v. Shaughnessy, 184 F. 2d 666 (2d Cir. 1950); U.S. ex rel. Harisiades v. Shaughnessy, 187 F.2d 137 (2nd Cir. 1951); Barber v. Gonzalez, 347 U.S. 637, 642 (1954). Thus, federal courts historically have applied the law "as it exists" at the time they decide the matter, not at the time a deportation order was entered. U.S. ex rel Wiczynski, supra.

By contrast, Section 602(d) of IMMACT carries over the old grounds, making OSCs served prior to March 1, 1991 still enforceable under the law "as it exists." IMMACT 602(c); Section 405 of the Act. Present law provides that the new grounds of deportability are not applicable to previously served OSCs. IMMACT 602(d).

In order for notice to be "provided" to an alien prior to March 1, 1991 pursuant to IMMACT 602(d), the regulatory requirements for service of notification must be met. "Routine service" of notice, which is permitted when serving OSCs, consists of mailing a copy of the OSC by ordinary mail addressed to a person at his or her last known address. See 8 C.F.R. 103.5a(a) (b) (c) and 242.1(c). Service by mail is "completed upon mailing" to the alien's last known address. 8 C.F.R. 103.5a(a) and (b). OSCs mailed before March 1, 1991, by ordinary or certified mail, therefore satisfy the regulatory requirements under 8 C.F.R. 242.1(c) and 103.5a(a), as do OSCs delivered in person or to the alien's attorney. 8 C.F.R. 103.5a(a). The time an OSC is filed with the Office of the Immigration Judge, which event vests jurisdiction and commencement of proceedings in the court under 8 C.F.R. 3.14(a), is not relevant to regulatory notice "provided to the alien" under Section 602 of IMMACT.

All OSCs continue to be prosecutable beyond March 1, 1991 on the basis of pre-IMMACT grounds of deportability and need not be reissued to reflect the new recodified grounds. However, when "routine service" of the OSC has been employed (ordinary mail) and the respondent does not appear for the initial hearing or acknowledge in writing that he or she has received the OSC, a copy of the OSC must be re-served by personal service (e.g. by mailing a copy by certified or registered mail, return receipt requested, addressed to the respondent at his or her last known address). See 8 C.F.R. 242.1(c). If the same OSC is re-served pursuant to this provision, the pre-IMMACT grounds of deportability still survive beyond March 1, 1991 if the original service of the OSC occurred before March 1, 1991 by ordinary mail to the last known address, because such service is deemed to have been "completed upon mailing." 8 C.F.R. 103.5a(b).

However, except where the pre-IMMACT ground has been entirely deleted by IMMACT and such ground should still be prosecuted in the exercise of prosecutorial discretion, any OSC required to be re-served by personal Service on or

after March 1, 1991 due to the alien's non-appearance pursuant to 8 C.F.R. 103.5a(b) should charge the new recodified ground(s). Deportable acts occurring before, on or after the date of enactment of IMMACT on November 29, 1990 may be charged based upon the new recodified grounds pursuant to the savings provision under IMMACT 602(c).

Re-serving a new OSC by personal service as a matter of administrative discretion (with a follow-up dismissal of the old OSC) avoids a possible claim that the old deportation ground(s) expired or that the pre-March 1, 1991 service of the charging document was inadequate and therefore unenforceable. No delay in deportation is caused by filing a new OSC containing the recodified grounds if an OSC is required to be re-served anyway to an alien who failed to appear after routine service was made pursuant to 8 C.F.R. 242.1(c).

/s/ Paul W. Virtue

Acting

Genco Opinion 91-41

Legal Opinion Deportation for "excludability at entry" and the amendments to INA 212(a)

G. H. Kleinknecht, Enforcement

CO 241-C

May 3, 1991

I. QUESTION

You have asked me to examine the following question: What effect will the amendment of Section 212(a) of the Immigration and Nationality Act, which becomes effective June 1, 1991, have on the enforcement of the "excludable at entry" deportation ground, with respect to aliens who enter the United States before June 1, 1991?

II. SUMMARY CONCLUSION

The amended version of Section 212(a) will have no effect in determining whether a deportation charge of "excludability at entry" may be sustained against an alien who has already entered the United States or who enters the before June 1, 1991. Instead, the alien's amenability to deportation would be determined by referring to the exclusion laws that existed at the time of the alien's entry.

III. ANALYSIS

On November 29, 1990, the President signed into law the Immigration Act of 1990 (the "1990 Act"), Pub. L. No. 101-649, 104 Stat. 4978 (1990). The 1990 Act is a comprehensive overhaul of several aspects of the immigration and naturalization laws. Included in the law's provisions are major revisions of grounds for both exclusion, id. 601, 104 Stat. at 5067, and deportation, id. 602, 104 Stat. at 5077, of aliens from the United States. The amendments to the deportation grounds became effective for proceedings in which the Service serves the appropriate charging document after February 28, 1991. Id. 602(d), 104 Stat. at 5082. The amendments to the exclusion grounds will be effective for applications for admission into the United States or for adjustment of status that are made after May 31, 1991. Id. 601(e), 104 Stat. 5077.

The former deportation provisions made an alien amenable to deportation if the alien "at the time of entry was within

one or more of the classes of aliens excludable by the law existing at the time of such entry." INA 241(a)(1), 8 U.S.C. 1251(a)(1) (1988) (emphasis added). The 1990 Act recodified, but did not amend, this provision. INA 241(a)(1)(A) as amended by 1990 Act 602(a), 104 Stat. at 5078. In fact, the new provision carries forward the old provision essentially verbatim. From the plain language of the statutory text, see INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (Scalia, J., concurring in the judgment), it is clear that Congress intended that Section 212(a) as it now exists should continue to be legally effective with respect to deportation proceedings under new Section 241(a)(1)(A) that may be brought against aliens who enter the United States before June 1, 1991.

A similar situation was presented by the original enactment of the Immigration and Nationality Act of 1952 (the "INA"), Pub. L. No. 82-414, 66 Stat. 163 (1952). In Matter of A—, 6 I&N Dec. 540 (BIA 1955), and Matter of M—, 5 I&N Dec. 676 (BIA 1954), the Board considered cases in which the aliens had entered the United States before enactment of the 1952 Act. The Service sought their deportation on the ground that they were excludable under the prior exclusion grounds. In each case, the Board held, consistently with the text of the "new" statute, that the dispositive question was whether the aliens were "excludable at the time of entry under the laws then existing." 6 I&N Dec. at 545.[FN1]

It is clear that the currently effective provisions of Section 212(a) will continue to apply to future deportation proceedings brought under new Section 241(a)(1)(A), if the alien entered the United States before June 1, 1991. For example, the law currently excludes illiterate aliens. INA 212(a)(25), 8 U.S.C. 1182(a)(25) (1988). This exclusion ground will not apply to aliens who enter after May 31, 1991. 1990 Act, 601(a), 104 Stat. 5067. An illiterate alien who enters before June 1, 1991, notwithstanding Section 212(a)(25), will continue to be deportable under Section 241(a)(1)(A). It is the exact exclusion ground that existed at the time of entry, not any similar ground under the law that exists at the time of the proceedings, that applies. INA 241(a)(1)(A). An order to show cause, therefore, must cite the precise former statute that supports the charge. Service officers, accordingly, must continue to be familiar with both the old and the new exclusion provisions.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-42

Legal Opinion: Use of Appropriated Funds to Acquire Works of Art Through a Contest

Phillip Cover, Connie Mackey, Co-Directors, INS Centennial Steering Committee

CO 1804-P

May 6, 1991

I. ISSUES PRESENTED

A. May a federal agency use appropriated funds to purchase works of art?

B. May a federal agency use appropriated funds to offer prizes in an art contest relating to immigration when the winning entries will become the property of the sponsoring agency?

II. SUMMARY CONCLUSIONS

A. Yes. 41 C.F.R. 101-26.103.2 expressly authorizes federal agencies to purchase, inter alia, works of art so long as they are not "intended solely for the personal convenience or to satisfy the personal desire of an official or employee."

B. Yes. Federal agencies may use appropriated funds to obtain items whose purchase would have been a proper expenditure, through sponsorship of a contest so long as the amount of the prize(s) is reasonably related to the amount the agency would have expended in purchasing a similar item through normal procurement procedures.

III. FACTS

As a part of its Centennial celebration, the Immigration and Naturalization Service (INS) is conducting an art contest on the theme of "Images of American Immigration." Entries may consist of artwork in any two-dimensional painting, drawing, or printmaking medium. INS plans to award a Grand Prize of $5,000, a First Place Prize of $3,000, two Second Place Prizes of $2,000, and three Distinguished Entry Prizes of $1,000. A jury composed of professionals in the arts and selected INS representatives will select the winners. All entries which receive one of the prizes listed above will become the property of INS. They will initially be part of an immigration exhibit which will tour the country, and will then be put on display in various INS offices. INS may also decide to purchase some of the entries which do not receive a prize.

IV. DISCUSSION

A. The Comptroller has long recognized that federal agencies may use appropriated funds to purchase certain kinds of decorative items, including works of art, for federal office buildings. See e.g., 9 Comp. Gen. 807 (1903); 7 Comp. Gen. 1 (1900). In 1971 the Federal Property Management Regulations put any remaining doubts on this issue to rest. 41 C.F.R. 101-26.103-2 reads:

> Government funds may be expended for pictures, objects of art, plants or flowers (both artificial or real), or any similar type items when such items are included in a plan for the decoration of Federal buildings approved by the agency responsible for the design and construction. Determinations as to the need for purchasing such items for use in space assigned to any agency are judgments reserved to the agency responsible for operation of the building. Except as otherwise authorized by law, Government funds shall not be expended for pictures, objects of art … or any similar type items intended solely for the personal convenience or to satisfy the personal desire of an official or employee. These items fall into the category of "luxury items" since they do not contribute to the fulfillment of missions normally assigned to Federal agencies.

In 60 Comp. Gen. 580 (1981) the Comptroller General considered the meaning of the limitation in the second half of the first sentence of this regulation concerning the requirement of "a plan for the decoration of Federal buildings … ." In this case the agency was leasing space in a privately owned building; "therefore no plan could have existed for the decoration of the entire building," and there was no federal agency responsible for the building's design and construction. Id. at 581. He found that the quoted regulatory language "applies [only] to new Federal construction and to major renovations of existing Federal buildings." Id.

After stating the long-standing rule that federal agencies may make such expenditures "when they would contribute to a pleasant working atmosphere, thus improving morale and efficiency", the Comptroller General concluded that "expenditures for decorative items are authorized when their purchase is consistent with work related objectives and the agency mission, and [that] the decision as to necessity rests within the agency's discretion pursuant to the regulation's terms." Id. at 582.

Thus it seems beyond challenge that INS may use appropriated funds to purchase works of art relating to the theme of "Images of American Immigration" for use in a travelling informational exhibition and subsequent display in INS office buildings. Since each original work of art is unique, the agency also has great discretion in deciding which works to

purchase. The only limitation is that it may not purchase a work to satisfy the personal wishes or desires of a particular employee or official.

B. Generally federal agencies may not use appropriated funds to fund the awarding of prizes in a contest. 5 Comp. Gen. 640 (1926). In subsequent decisions, however, the Comptroller General has carved out an exception to this rule for contests involving artistic design. E.g., A-13559 (Apr. 5, 1926). The keys to this exception are that (1) the government must acquire ownership of the entries for which it awards prizes, and (2) the amount of the prize must be reasonably related to the price that the government would have had to pay to purchase a similar item on the open market (i.e., the fair market value). See e.g., 19 Comp. Gen. 287 (1939) (design of advertising material for savings bonds); 18 Comp. Gen. 862 (1939) (plaster models for Thomas Jefferson Memorial); 14 Comp. Gen. 852 (1935) (bronze tablets and memorials for Boulder Dam). It appears from the facts stated above that the contest at issue here satisfies the requirements for this exception to the general rule.

V. CONCLUSION

Both the Federal Property Management Regulations and decisions of the Comptroller General make it clear that federal agencies can use appropriated funds to purchase works of art as long as they are not doing so to satisfy the wishes of a particular individual. They can also acquire works of art through sponsorship of a contest if the amount of the prizes approximates the fair market value of the works acquired in this manner.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-43

Translators at Los Angeles to complete inspections

Michael T. Lempres, Executive Commissioner

HQ-235

May 10, 1991

This memorandum is in response to your recent inquiry (copy attached) about utilizing non-Service controlled translators at the international airport in Los Angeles, California. The Service does not have the authority to require translators, other than those employed by or under contract to the Service, to assist in the immigration inspection process. In order to achieve sustainable determinations during each immigration inspection, it is important that our inspectors, and our attorneys, have complete confidence in the accuracy of any translations during the immigration inspection process. In order to maintain such confidence, it would seem advisable to utilize only those translators who are directly accountable to the Service.

Undoubtedly, there are instances, particularly with regard to infrequently encountered languages and dialects, when translators are not readily available at the time of immigration inspections. It is our understanding that Service employees or individuals under contract to the Service are normally available to provide translation of frequently encountered languages and dialects (or the inspector is fluent in the encountered language or dialect). For less frequently encountered languages and dialects, it might be advisable (and economical) to develop a roster of translators who could be on call, as needed, at or to each Service inspection station. Within the strictures of Federal government contracting regulations, such

rosters could be developed through cooperative initiatives with the transportation companies, airport authorities, and other involved agencies or entities; or independently by the Service.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-44

Legal Opinion: Proceedings applicable to Salvadoran TPS Aliens After Advance Parole

James A. Puleo, Associate Commissioner, Examinations

CO 212.28

CO 244A

May 13, 1991

I. QUESTION

The question has arisen whether a Salvadoran alien with temporary protected status (TPS) who is granted advance parole, under Section 303(c)(4) of the Immigration Act of 1990 (IMMACT), Pub. Law 101-649, is subject to exclusion or to deportation proceedings.

II. CONCLUSION

An alien granted TPS who departed and returned pursuant to advance parole may be placed in exclusion proceedings at the end of the TPS period. However, the alien must be given notice at the time advance parole is authorized of the loss of entitlement to a deportation proceeding.

This conclusion applies to aliens receiving TPS under Section 303 of IMMACT and to aliens receiving TPS under Section 244A of the Immigration and Nationality Act, as amended by IMMACT, 8 U.S.C. 1254a.

III. ANALYSIS

Section 303(c)(4) of IMMACT permits a Salvadoran who has been granted TPS to be absent from and return to the United States after a departure for emergency circumstances, pursuant to "advance parole." The alien must establish that emergency and extenuating circumstances beyond the control of the alien require his or her "brief, temporary trip abroad."

It is settled that an alien in parolee status is not considered to be "in" the United States. Section 212(d)(5) of the Act. When an alien is admitted only on parole, upon termination of the parole the alien "[must be] dealt with in exclusion proceedings." Id.; Leng May Ma v. Barber, 357 U.S. 185 (1988); Matter of A., supra; Matter of Lin, 18 I&N 219 (BIA 1982); Landon v. Plasencia, 459 U.S. 21 (1982). Accordingly, a TPS alien who receives a grant of advance parole is subject to exclusion, not deportation proceedings, upon the termination of the TPS status.

The concern has been raised that this conclusion conflicts with the provision of Section 303(d)(1) of IMMACT,

which provides for the enforcement of departure of Salvadorans after the termination of designation of El Salvador as a country whose nationals may be provided Temporary Protected Status (TPS). This provision requires the INS to serve on the alien an "order to show cause [OSC] that establishes a date for deportation proceedings which is after the date of such termination of designation."

This OSC requirement applies only to aliens who are "in" the United States by virtue of an "entry" made, not to those who have been paroled in and have not made an "entry." See, generally, Section 241(a) of the Act (grounds of deportability depend upon an alien's having made an entry). When an alien enters the United States free from official restraint, even though his entry may have been surreptitious, his removal may be accomplished only in deportation proceedings. Matter of Ching & Chen, 19 I&N Dec. 203 (BIA 1984); Matter of A., 9 I&N Dec. 536 (BIA 1961); Sang v. Esperdy, 210 F. Supp. 786 (S.D.N.Y. 1962).

The legislative history of the TPS provision indicates that the OSC requirement was a concession to the dissenting view that passage of TPS legislation would improperly send a "strong signal that the U.S. is no longer applying a strict definition of political asylum but rather acts on an ad hoc basis in granting stays of deportation." Id., Dissenting Views to Report on H.R. 45, Committee on Judiciary, September 19, 1989. Whether departure is enforceable by exclusion or by deportation is immaterial to this purpose of ensuring the aliens' departure.

In sum, in the words of Senator DeConcini, Section 303 of the bill "will facilitate the return of Salvadorans when the period of temporary protected status expires." Cong. Rec. S 17106, October 26, 1990. An exclusion charging document clearly serves this congressional purpose.

However, it must be noted that, in contrast to deportation proceedings, exclusion proceedings do not provide avenues of relief such as voluntary departure, suspension of deportation, or designation of country of choice for deportation. Compare, generally, 8 C.F.R. 236, with 8 C.F.R. 242.17; Section 243(a) of the Act. Federal courts have not approved INS' placing an alien in exclusion proceedings after advance parole, without providing the alien with sufficient notice of the loss of entitlement to deportation proceedings at the time the alien was granted advance parole by the Service. See Joshi v. District Director, 720 F.2d 799 (4th Cir. 1983) and Patel v. Landon, 739 F.2d 1455 (9th Cir. 1984). In these cases, the courts held that these nonimmigrant aliens should not have been placed in exclusion proceedings after their brief absences pursuant to advance parole, because of lack of notice. In Joshi, the court expressed concern that the Form I-512 "did not notify Joshi that departure, travel, and return pursuant to the advance parole would result in the loss of entitlement to a deportation hearing." 720 F.2d at 802. In Patel the court noted:

> By seeking advance parole prior to his departure from this country in 1978, appellant sought to preserve his right to deportation proceedings upon his return. Form I-512, which appellant filled out in conjunction with his request for advance parole, did not sufficiently indicate otherwise.
>
> 739 F.2d at 1457.

Notice of the loss of deportation benefits to an TPS alien at the time advance parole is approved meets the courts' test for permissible traditional exclusion proceedings. Accordingly, INS employees should be instructed to indicate on the I-512 that the alien will be placed in exclusion proceedings and will not benefit from any relief available in deportation proceedings.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-45

Legal Opinion Your April 29, 1991, Memorandum: Retroactive Approval of Relative Petition When Petitioner Dies (COADN # 6.YSK)

R. Michael Miller, Deputy Assistant Commissioner, COADN

CO 204.21-C

June 5, 1991

ATTN: Yolanda Sanchez-K., Senior Immigration Examiner

I. QUESTIONS

In the subject memorandum, you request a Legal Opinion concerning the following questions:

A. Does the Service have any lawful authority to approve an alien relative visa petition (Form I-130) after the petitioner's death?

B. If there were shown to be "unreasonable delay" in the processing of an alien relative petition, would estoppel or equity prevent the Service from denying the petition because of the petitioner's death?

II. SUMMARY CONCLUSIONS

A. The Service has no authority to approve an alien relative visa petition after the petitioner's death.

B. Even in a case of "unreasonable delay," neither estoppel nor equity precludes the Service from denying a visa petition because of the petitioner's death.

III. ANALYSIS

These questions arise from a March 8, 1991, letter which — sent to Yolanda Sanchez-K. Mr. — represented a United States citizen who filed an I-130 on behalf of his alien spouse. The couple married February 27, 1990. The citizen spouse filed the I-130 on March 30, 1990.[FN1]

The Service scheduled an interview for September 18, 1990. The petitioner died September 3, 1990, of myeloma, a form of cancer. Mr. — argues that the Service must approve the petition, notwithstanding the petitioner's death. He bases this argument on the Service's "extraordinary delay" in processing the petition. Although fewer than six months elapsed between the filing of the Form I-130 and the petitioner's death, Mr. — believes that this constitutes "extraordinary delay" in this case. He believes this is so because he informed the Service of the petitioner's illness, but the Service did not schedule the interview earlier. Enclosed with Mr. —'s letter is an August 17, 1990, letter from the petitioner's physician to the Assistant District Director for Examinations in Philadelphia, indicating the petitioner's deteriorating condition.

A. The Service Has No Authority to Approve an Alien Relative Visa Petition After the Petitioner's Death

A citizen who wants the Service to accord immediate relative status to his or her alien spouse must file an alien relative visa petition (Form I-130) with the Service. INA 204(a), 8 U.S.C. 1154(a); 8 C.F.R. 204.1(a). The Board has held, however, that the petition must be denied if the petitioner dies while the petition is pending. Matter of Varela, 13 I&N Dec. 453 (BIA 1970). Furthermore, an intended beneficiary does not have standing to prosecute a visa petition proceeding after the petitioner's death. Matter of Sano, 19 I&N Dec. 299 (BIA 1985). Since these are precedent decisions, the Board's opinions in Varela and Sano are binding on all Service officers. 8 C.F.R. 3.1(g). The Service, therefore, is constrained to deny the petition.

Furthermore, even if there were no precedent Board decisions on this issue, the statute itself would require the Ser-

vice to deny the petition. Before approving a petition, the Service must conduct "an investigation of the facts in each case." INA 204(b), 8 U.S.C. 1154(b). The Service may approve the petition only if "the alien in behalf of whom the petition is made is an immediate relative." Id. To be an "immediate relative" an alien must be the child, spouse, or parent of a United States citizen. Id. 201(b), 8 U.S.C. 1151(b). The petitioner in the case Mr. — wrote about is dead. The intended beneficiary is no longer the spouse of a United States citizen. Since she is not an "immediate relative" as defined in the statute, the Service must deny the petition. See id. 204(b), 8 U.S.C. 1154(b).

Mr. — cites several cases that he believes require, or at least permit, the Service to approve relative visa petition after the petitioner's death. None of these cases are persuasive. Two cases, Leano v. INS, 460 F.2d 1260 (9th Cir. 1972), and Pierno v. INS, 397 F.2d 949 (2d Cir. 1968), involved situations in which the petitioners died after the Service had approved the visa petitions. Thus, these cases involved the application of 8 C.F.R. 205.1(a)(3). This regulation provides that a petitioner's death revokes a prior approval of a visa petition, but gives the Service discretion not to revoke the approval for humanitarian reasons. 8 C.F.R. 205.1(a)(3). These cases, therefore, are distinguishable from Mr. —'s case, in which the petitioner died before the Service approved the petition. In fact, the Board in Varela explicitly rejected the argument that Pierno applies to cases like Mr. —'s case. 13 I&N Dec. at 454.[FN2]

Mr. — cites Stellas v. Esperdy, 388 U.S. 462 (1967) as a "leading case." — Letter at 2. He argues that "[t]he determination in the Supreme Court is significant since the decision below approved the Immigration Service's revocation of an immediate relative petition on the withdrawal of the petition by the citizen spouse." Id. The action of the Supreme Court in Stellas is not at all significant. The entire text of the per curiam order reads:

> The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Southern District of New York with directions that it be returned to the Immigration and Naturalization Service for further administrative proceedings.

388 U.S. at 462. The primary issue below was whether the alien was entitled to deportation proceedings, rather than exclusion proceedings, following the revocation of his parole after a prolonged sojourn as a paroled crewman. See United States ex rel. Stellas v. Esperdy, 366 F.2d 266 (2d Cir. 1966). The Second Circuit addressed the propriety of the Service's revocation of a visa petition that had been approved, but clearly considered this a tangential issue. Id. at 269, n. 4. Nothing in the Supreme Court's order indicates that the propriety of the revocation was a significant, or even a relevant, factor in the Supreme Court's action. 388 U.S. at 462.

B. Even in a Case of "Unreasonable Delay," Neither Estoppel Nor Equity Precludes the Service from Denying a Visa Petition Because of the Petitioner's Death

One case that Mr. — cites appears to give some support his position. See Sanchez-Trujillo v. INS, 632 F. Supp. 1546 (W.D.N.C. 1986); id. 620 F. Supp. 1361 (W.D.N.C. 1985). In this case, the Court ordered the approval of a visa petition, notwithstanding the petitioner's intervening death. 632 F. Supp. at 1554. The Service had returned the petitioner's second preference petition, because the intended beneficiary had been born out of wedlock. Under the law, however, the petitioner could file a petition for an child born out of wedlock, if the child had been legitimated. INA 101(b)(1)(C), 8 U.S.C. 1101(b)(1)(C). The Service had neglected to advise the petitioner of his right to appeal the rejection of the visa petition.[FN3] The beneficiary came to the United States in 1982 as a B-2 visitor for pleasure. Despite her request, her father never pursued his petition further. After her father's death in 1983, the beneficiary filed a motion with the Service for reconsideration of the 1977 rejection of the visa petition. The Service denied the motion.

In its earlier decision, the court held that the plaintiff, as a beneficiary, had standing to challenge the Service decision. 620 F. Supp. at 1363. In the final decision, the court found that the petitioner's I-130 "at least put [the Service] on notice" that the plaintiff had been legitimated, because the I-130 referred to the petitioner's Form I-550, "which stated that the Plaintiff was his 'illegitimated' child who was 'recognized by father.'" 632 F. Supp. at 1552. The Court held that

the Service's misstatement of the law justified approving the visa petition as of the date on which the petitioner attempted to file the petition, notwithstanding the petitioner's later death. Id. at 1553, 1554.

There are several reasons for giving the Sanchez-Trujillo decisions little or no precedential weight. First, when a court decision conflicts with a Board precedent, the Board's usual practice is to follow the court decision only in cases arising within the court's territorial jurisdiction. Matter of Amado & Monteiro, 13 I&N Dec. 179 (BIA 1969). Thus, any precedential value Sanchez-Trujillo may have is limited to the cases arising in the Western District of North Carolina. Mr. —'s case arises in Pennsylvania. The Service is, therefore, bound to follow the Board's decisions in Varela and Sano. 8 C.F.R. 3.1(g). The intended beneficiary in Mr. —'s case lacks standing to pursue the visa petition in her late husband's stead. Sano, supra; see also 8 C.F.R. 103.3(a)(1)(iii) (visa petition beneficiary is not an "affected party" for purposes of appeal). Because the petitioner is now dead, the Service must deny the petition. Varela, supra.

Secondly, Mr. —'s case is distinguishable from the facts in Sanchez-Trujillo. According to the court, the Service had acted improperly in refusing to accept the filing of Sanchez' visa petition. This action was an abuse of discretion, because it was based on an improper understanding of the law. The court found that the Service action had unreasonably delayed the Plaintiff's bid for permanent residence. Mr. —'s case presents no suggestion of improper Service action. The interview in this case was scheduled within six months of the filing of the petition. This interval is apparently normal, given the caseload in the Eastern Region. The interval is also considerably less than the 18 month delay which the Supreme Court held did not constitute misconduct in INS v. Miranda, 459 U.S. 14 (1982). Furthermore, it was not until August 17, 1990, that Mr. — presented the physician's statement verifying the petitioner's illness. This was just one month before the scheduled interview, and little more than two weeks before the petitioner's death.

Finally, and most importantly, the Service should decline to extend the reasoning of Sanchez-Trujillo because this case was wrongly decided. Because of the petitioner's death, the relationship necessary to qualify the plaintiff as a second preference immigrant no longer existed. The statute no longer permitted approval of the petition. INA 204(b), 8 U.S.C. 1154(b). Neither estoppel, Miranda, supra; INS v. Hibi, 414 U.S. 5 (1973); Montana v. Kennedy, 366 U.S. 308 (1961), nor equity, INS v. Pangilinan, 486 U.S. 875 (1988), gives a court authority to extend benefits under the immigration laws to aliens who do not meet the precise requirements of the law.[FN4] In Mr. —'s case, the petitioner's death means the intended beneficiary is no longer an "immediate relative" as that term is defined by Section 201(b). The Service, therefore, may not approve the petition which the petitioner had filed before his death. INA 204(b), 8 U.S.C. 1154(b); Sano and Varela, supra.

We note that the President has signed legislation that will permit posthumous approval of spousal immediate relative petitions under certain conditions. Immigration Act of 1990, Pub. L. No. 101-649, 101(a), 104 Stat. 4978, 4981 (1990) amending INA 201(b), 8 U.S.C. 1151(b). This provision does not take effect, however, until October 1, 1991. Id. 161(a), 104 Stat. at 5008. Furthermore, the petitioner and intended beneficiary in Mr. —'s case were married just over six months. This is considerably short of the two year period provided for in the amendment. 1990 Act, 101(a), 104 Stat. at 4981.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-46

Legal Opinion: Suitability of Items Bearing the INS Centennial Logo as Supplemental Awards

Michael Mattice, Chief, Contracts

CO 643-P

June 6, 1991

I. ISSUE PRESENTED

Is it an appropriate exercise of agency discretion to add items bearing the INS Centennial logo to the list of items approved for use in the agency Supplemental Awards Program?

II. SUMMARY CONCLUSION

Yes. The use of items bearing the INS Centennial logo as supplemental awards is an appropriate exercise of the agency's authority under the Government Employees' Incentive Awards Act (5 U.S.C. 4501–4507) and implementing Office of Personnel Management (OPM) regulations.

III. FACTS

By memorandum dated July 25, 1986, from the Associate Commissioner for Management, INS formally adopted a Supplemental Awards Program. The authority for such programs is found in the Government Employees' Incentive Awards Act, 5 U.S.C. 4501–4507, and implementing OPM regulations, 5 C.F.R. Part 451 and Chapter 451 of the Federal Personnel Manual. This program limited the items which supervisors could utilize in this program to mugs and paperweights, and the amount which they could spend per item to $10.00. The underlying decision memo (dated January 28, 1985) stated that these awards were appropriate "in instances where individual and/or group performance reflects a high level of quality and dedication to duty which … would not merit a cash or Departmental or bureau level honorary award [but which] does reflect a positive contribution to the Service."

The July 1986 memorandum stated the following with regard to the purchase of items to be used as supplemental awards:

> Acquisition of these items should be accomplished in accordance with existing regulations and policies. That is, ordering offices may use imprest funds, purchase orders, blanket purchase agreements or any other appropriate and recognized mechanism to purchase these items. As a matter of course, to achieve possible cost savings, consolidation of requirements should be explored whenever possible.

By memorandum dated April 4, 1991, the Associate Commissioner for Management proposed, and the Chief of Staff approved, expanding the items approved for use as supplemental awards to include the following items containing the INS Centennial logo: coasters, key fobs, twill baseball caps, and commemorative mugs. The memorandum expressly stated that this expansion was to be subject to "the previously established guidelines" discussed above.

IV. DISCUSSION

The initial decision to limit the items which INS supervisors could use as supplemental awards to paperweights and mugs having a value of $10.00 or less was a policy one; there are no such restrictions in either the Government Employees' Incentive Awards Act or the implementing OPM regulations. The Comptroller General has approved a variety of items as being appropriate for presentation under a supplemental awards program. 67 Comp. Gen. 349 (1988) (telephones costing $27); 55 Comp. Gen. 346 (1975) (marble paperweights and walnut plaques-no value stated); 46 Comp. 662 (1967) (engraved credentials holder costing $280); B-184306 (August 27, 1980) (desk medallions-no value stated). These opinions make it clear that agencies have extremely broad discretion in determining what constitutes an appropriate supplemental award but offer little guidance as what would constitute an abuse of that discretion. In one opinion he inferred, but did not hold, that such awards should recognize employees' contributions "in an appealing and dignified manner." 46

Comp. Gen. supra at 663.

With regard to the amount which an agency can expend on a supplemental award, the Comptroller General quotes with approval a letter dated January 30, 1967, from the Chairman of the Civil Service Commission (now the Director of OPM): "Neither the statute or the regulations place a limit on the expenses attached to conferring an honorary award."

Thus, although we cannot cite an express authorization, we see no basis for concluding that it was improper to expand the list of items approved for supplemental awards to include those set forth in the April 4, 1991, memorandum described above. We note, however, that you asked that we also review this matter "with a view toward rendering an opinion as to whether or not we are essentially mandating sole source acquisition and, if so, that is proper."

We assume that you based this question on the fact that The Nation of Immigrants Foundation (Foundation) is currently the only company producing items bearing the INS Centennial logo. By letter dated January 28, 1991, from Verne Jervis and Elizabeth Chase MacRae, Co-Chairpersons of the INS Centennial Committee, INS granted the Foundation "the exclusive right to use the INS Centennial logo … , and to license other private sector companies, in the manufacture and distribution of appropriate products involving the INS Centennial during the 1991 Centennial year." The letter also states, however, that this license is subject to INS's retention of "the right to use the INS Centennial logo for any authorized purpose." Thus it is clear that INS is free to contract with any company for the purchase of items bearing the Centennial logo for use as supplemental awards.

Furthermore, as stated above, the expansion of eligible items is subject to "previously established guidelines," including that quoted above concerning procurement. Therefore you should handle any procurement of items to be used as supplemental awards, and bearing the INS Centennial logo, in exactly the same manner as you have handled procurements of mugs or paperweights bearing the traditional INS logo in the past. Thus, adding the Centennial items to the list of those approved for use as supplemental awards is not "mandating sole source acquisition."

V. CONCLUSION

There is no provision in either the Government Employees' Incentive Awards Act or the implementing OPM regulations which would prohibit INS from expanding the list of items approved for use as supplemental awards to include those set forth in the April 4, 1991, memorandum described above.

Should you have any further questions regarding this matter, please contact Doug Wood, Assistant General Counsel, at 514-1260.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-47

Legal Opinion Q nonimmigrant visas and au pairs

Edward J. Lynch, Special Assistant to the Commissioner for Policy Development

CO 101q-C

June 10, 1991

I. QUESTION

This memorandum supersedes our June 7, 1991, Legal Opinion on the subject issue and addresses the following question:

Do the au pair programs currently existing under the supervision of the United States Information Agency qualify as international cultural exchange programs for purposes of the new "Q" nonimmigrant visa category?

II. SUMMARY CONCLUSION

The au pair programs do not qualify as international cultural exchange programs for purposes of the new "Q" nonimmigrant visa category. Legislation amending Section 101(a)(15)(Q) of the Immigration and Nationality Act, as amended, would be necessary in order to admit alien participants in au pair programs with "Q" nonimmigrant visas.

III. ANALYSIS

This issue involves interpretation of Section 101(a)(15)(Q) of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101(a)(15)(Q), as amended by the Immigration Act of 1990, Pub. L. No. 101-649, 208, 104 Stat. 4978, 5026 (1990). The amendment will take effect on October 1, 1991. Id. 231, 104 Stat. at 5028. As with any statutory text, the intent of Section 101(a)(15)(Q) is to be drawn from the text of the statute itself. Mallard v. United States Dist. Ct. for the South. Dist. of Iowa, 109 S.Ct. 1814, 1818 (1989); INS v. Phinpathya, 464 U.S. 183, 189 (1984); Richards v. United States, 369 U.S. 1, 9 (1962). If the statute is clear it is unnecessary, INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) and, arguably, inappropriate, id. at 452 (Scalia, J., concurring in the judgment), to consult any extrinsic source to discern the meaning of the text. Section 101(a)(15)(Q) creates a nonimmigrant visa category that will permit the admission into the United States of an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program designated by the Attorney General for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers.

1990 Act, 208, 104 Stat. at 5027 (emphasis added). The fundamental purpose of the "Q" category is to foster the "sharing of the history, culture, and traditions of" the participant's country. Id. Employment may be an aspect of a "Q" program. Id. Nevertheless, a program must qualify as a "international cultural exchange program" in order for its participants to qualify for "Q" nonimmigrant visas. Id.

The au pair programs currently conducted under the supervision of the United States Information Agency clearly do not qualify for designation as "Q" programs. The General Accounting Office has concluded that the au pair programs do not qualify as "cultural exchange" programs. U.S. Information Agency: Inappropriate Uses of Educational and Cultural Exchange Visas (GAO Report to Congressional Committees # NSIAD-90-61) at 18–20. Rather, these au pair programs "are essentially child care work programs." Id. at 20. The Departments of State and Labor, the Service, and the USIA have reached the same conclusions. Id. Since the au pair programs are temporary foreign worker programs rather than cultural exchange programs, id., they do not qualify for inclusion in the new "Q" provision, 1990 Act, 208, 104 Stat. at 5028.

Even assuming, for the sake of argument, that the intent of Section 101(a)(15)(Q) is not conveyed by the clear language of the text, such legislative history as exists supports the conclusion that the au pair programs do not qualify for "Q" status. The "Q" provision was part of H.R. 4300, 101st Cong., 2d Sess., as reported by the House Judiciary Committee. H. Rep. No. 723, Part 1, 101st Cong., 2d Sess. at 17, 71 (1990). The House passed HR 4300 on October 3, 1990. 136 Cong. Rec. H8721 (daily ed. October 3, 1990). The House then took up S. 358, which the Senate had approved earlier. Id. The House amended S. 358 by substituting the text of H.R. 4300, and then approved S. 358 as amended. Id. at 8737.

Neither the report accompanying H.R. 4300, H. Rep. No. 723, supra, nor the conference report, H. Rep. No. 955, 101st Cong., 2d Sess. 126 (1990), address the use of the new "Q" visa for au pair programs. As originally introduced by Mr. Morrison, however, H.R. 4300 included a separate provision addressing the visa classification and program requirements for the au pair programs. H.R. 4300, 101st Cong., 2d Sess. 105(e) (March 19, 1990). This provision was included in H.R. 4300 as reported, see H. Rep. No. 723, supra at 14, and as passed by the House, 136 Cong. Rec. at H8721. The au pair provisions became part of S. 358 as amended and approved by the House. Id. at 8737. The conferees, however, deleted the au pair provisions from the final text of S. 358. H. Rep. No. 955, supra, at 126.

Had S. 358 been enacted as approved by the House, au pairs would continue to be admitted with "J" visas, but the programs would be subject to closer supervision by the Department of Labor. See H. Rep. No. 723, supra, at 14. Nothing in the legislative history indicates that the conferees deleted the au pair provisions because the provisions "overlapped" with the "Q" visa, or that the intent of the final legislation was that the "Q" visa be used for these programs. See H. Rep. No. 955, supra, at 126. Thus, it is reasonable to infer that Congress did not intend the deletion of the au pair provisions to alter the scope of the "Q" visa. This conclusion is bolstered by the fact that Congress was aware that, as currently constituted, the au pair programs are temporary worker programs, rather than cultural exchange programs. See H. Rep. No. 798, 101st Cong., 2d Sess. at 5–6 (1990); H. Rep. No. 723, supra, 68; see also 136 Cong. Rec. H8812 (daily ed. October 3, 1990) (statement of Rep. Dymally).

Only "international cultural exchange" programs qualify for use of the new "Q" nonimmigrant visa. 1990 Act, 208, 104 Stat. at 5027. The au pair programs are temporary worker programs, rather than cultural exchange programs. Thus, participants in these programs do not qualify for use of the new "Q" visa. Legislation amending Section 101(a)(15)(Q) of the Immigration and Nationality Act, as amended, would be necessary in order to admit alien participants in au pair programs with "Q" nonimmigrant visas.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-48

MATTER OF — In Section 212(d)(3) Proceedings

James H. Montgomery, District Director, Detroit, Michigan

June 12, 1991

While it is advisable that you designate an examiner to adjudicate this matter in the normal course, the following legal analysis of the materials presented is submitted for your information:

Statement of the Case

Applicant has applied on Form I-192 for an advance waiver of inadmissibility under Section 212(d)(3) of the Immigration and Nationality Act.

He was ordered deported by an Immigration Judge for failure to maintain his H-1 nonimmigrant status, and was convicted of an aggravated felony during his deportation proceedings, on October 17, 1989. He twice requested advance parole, which was denied by INS after reconsidering additional materials submitted.

Presently, applicant has an appeal of his deportation order pending before the Board of Immigration Appeals. In his Notice of Appeal, he claims that the Immigration Judge should not have denied his request for voluntary departure be-

cause he was granted a judicial recommendation against deportation (JRAD) by the criminal sentencing judge. He claims that the Immigration Judge should not have considered his conviction for importation of cocaine in denying his request for voluntary departure.

While the Immigration Act of 1990 (IMMACT) has divested judges of the authority to issue JRADs, it was well settled even before IMMACT that a judicial recommendation against deportation is statutorily ineffectual against a conviction for a drug offense. Section 241(b) of the Act. The BIA further held that where a JRAD is properly granted (for a CIMT) the criminal conviction still constitutes an adverse discretionary factor that may be used as a basis to deny relief from deportation, outside the Third Circuit. See, Matter of Gonzalez, 16 I&N Dec. 134 (BIA 1977).

Because applicant has conceded that he is deportable, he has no present right to remain in the United States.

In support of this application, applicant has submitted Form I-129H for H-1B classification; a letter from his employer, the Detroit Red Wings; Form I-192 application for advance permission to enter, his criminal records; his own affidavit and letters from his physician and probation officer.

Discussion

Applicant does not dispute his inadmissibility under sections 212(a)(23) (drug conviction), 212(a)(5) (chronic alcoholic) and 212(a)(9) (crime involving moral turpitude) of the Act. See applicant's brief and Form I-192 application dated February 4, 1991, Item 12.

A determination of eligibility for a waiver of grounds of inadmissibility under Section 212(d)(3) of the Act requires weighing at least three factors: 1) the risk of harm to society if the applicant is admitted; 2) the seriousness of applicant's immigration law, or criminal law violation; and 3) the nature of the applicant's reasons for wishing to enter the United States. Matter of Hranka, 16 I&N Dec. 491 (BIA 1978).

With respect to the first factor, applicant is statutorily presumed to be a danger to the community by virtue of his 1989 conviction for importation of cocaine, which is an aggravated felony conviction. See definition of aggravated felony under Section 101(a)(43) of the Act; Section 243(h)(2) of the Act. Applicant does not dispute that his conviction is considered to be an aggravated felony. See Application Form I-192, Item 12. Under Section 515 of IMMACT, an aggravated felony is considered to be "a particularly serious crime" rendering the alien a "danger to the community", (thereby invoking the bar to the relief of asylum or withholding of deportation despite an alien's ability even to demonstrate a well-founded fear persecution). Sections 208(d) and 243(h)(2) of the Act.

Concerning the second factor, the seriousness of the criminal conviction has been underscored by Congress, which created various additional sanctions for aliens convicted of aggravated felonies under the Anti-Drug Abuse Act (ADAA) and IMMACT, such as precluding eligibility for asylum and withholding of deportation, nothwithstanding a fear of persecution in the home country.

Finally, applicant's reasons for wishing to enter the United States, as a contract professional hockey player, may not be compelling. Appropriate medical treatment in Canada does not appear to be foreclosed. The BIA recognizes the need to present more emergent reasons for entering or staying in the United States where an applicant has "a serious criminal violation." Matter of Wong, Index Decision A21 509 644 (BIA 1988) [unpublished decision as cited by counsel]. The opportunity to play professional hockey in Canada does not appear to be foreclosed. Potential financial detriment caused by one's return to his home country has consistently been held by the Board and courts to be insufficient to constitute an "extreme hardship" if returned to the home country. Matter of Anderson, supra; Carnalla-Munoz v. INS, 627 F.2d 1004 (9th Cir. 1968). An alien's inability to find suitable employment for his level of skill or comparable to his employment in the United States has also been held to be insufficient to establish extreme hardship (for suspension purposes). Kasgravi v. INS, 400 F.2d 675 (9th Cir 1968).

Additional discretionary factors to consider include: family ties within the United States, residence of long duration in this country (and whether commenced at a young age), hardship to the applicant and family if he must return to his

home country and service in the U.S. Armed Forces. Other relevant factors include applicant's employment history, property or business ties in the United States, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists and evidence of good moral character. Matter of Edwards, 10 IN Dec. 506 (BIA 1963); Matter of Marin, supra. Where there exists a criminal record, rehabilitation must ordinarily be established. Id. Applicant is still under the constraints of supervised release. A person who falls within Section 101(f)(a)(3) of the Act (drug offense) cannot establish good moral character. The materials need close scrutiny as to consistency and probative value.

Conclusion

Your designated examiner should evaluate the materials contained in the administrative record and render a decision in the normal course. See 8 C.F.R. 103.2, 103.3 and 212.4. The documentary evidence presented in support of the waiver application should be closely scrutinized as to its consistency and probative value. A paginated record of proceeding (i.e. numbered Xerox copies of all information relied upon by the examiner) should be affixed to the examiner's decision for review by the Board if an appeal is taken, and for any further review by a federal court.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-49

Legal Opinion Your June 3, 1991, Memorandum: Advanced Parole for TPS eligible aliens in deportation proceedings

Terrance O'Reilly, TPS Coordinator

CO 1588-C

June 17, 1991

I. QUESTION

In the subject memorandum, you present the following issues:

A. May the Service grant advance parole to an alien who is in deportation proceedings, but who has been granted temporary protected status (TPS)?

B. What effect would the alien's departure under advance parole have on the pending deportation proceedings?

C. If the deportation proceedings are concluded, and the alien is subject to a final deportation order, what are the consequences of the alien's departure from the United States?

II. SUMMARY CONCLUSION

A. The Service may grant advance parole to an alien granted TPS, even if the alien is subject to pending deportation proceedings.

B. When an alien granted TPS departs the United States under advance parole while subject to pending deportation proceedings, the Service should move to dismiss the deportation proceedings under 8 C.F.R. 242.7(b).

C. If an alien granted TPS is subject to a final deportation order, the alien's departure from the United States executes the deportation order. The alien is then subject to exclusion, but this excludability does not preclude the Service

from paroling the alien upon his or her return to the United States. The Service may also waive the exclusion ground and admit the alien, if he or she has a valid visa and is otherwise admissible.

III. ANALYSIS

A. The Service May Grant Advance Parole to an Alien Granted TPS, Even If the Alien Is Subject to Pending Deportation Proceeding

The Immigration and Nationality Act of 1952, as amended, gives the Attorney General discretion to grant temporary protected status (TPS) in the United States to aliens who are nationals of foreign states designated for this purpose by the Attorney General. INA 244A(a), 8 U.S.C. 1254a(a). An alien who has been granted TPS may lawfully accept employment in the United States. Id. 244A(a)(2), 8 U.S.C. 1254a(a)(2). The alien may also travel abroad, "with the prior consent of the Attorney General." Id. 244A(f)(3), 8 U.S.C. 1254(a)(f)(3). The granting of TPS, however, does not automatically grant the alien consent to travel abroad. See 8 C.F.R. 240.15(a), as amended at 56 F.R. 23491, 23497 (1991). Rather, the alien must request travel authorization "pursuant to the Service's advance parole provisions." Id.

These advance parole provisions are set forth in Operations Instructions 212.5(c). The present question arises because this Instruction provides that advance parole may be granted to

> [a]n alien who … is not under deportation proceedings, in whose case parole has been authorized by the district director because of emergent or humanitarian considerations.

O.I. 212.5(c)(5) (emphasis added). This O.I. has been superseded by statute, however, with respect to aliens granted TPS. The statute and the regulations expressly provide that TPS aliens may travel abroad, so long as they obtain permission. See INA 244A(f)(3), 8 U.S.C. 1254a(f)(3); 8 C.F.R. 240.15. Neither the statute nor the regulation limits the opportunity to seek advance parole to TPS aliens who are not in proceedings. Id. Thus, the fact that deportation proceedings are pending against an alien granted TPS does not preclude granting the alien permission to travel under advance parole.

B. When an Alien Granted TPS Departs the United States under Advance Parole While Subject to Pending Deportation Proceedings, the Service Should Move to Dismiss the Deportation Proceedings

Our conclusion that TPS aliens in deportation proceedings may be granted advance parole raises an additional question: what is the status of these aliens upon their return to the United States? In Matter of Brown, 18 I&N Dec. 324, 325 (BIA 1982), the Board held that an alien may not avoid deportation proceedings by leaving the United States and then reentering. The case of an alien who travels abroad and returns to the United States under advance parole, however, is distinguishable from Brown. An alien granted parole has not made an "entry" into the United States, for purposes of the immigration laws. INA 212(d)(5)(A), 8 U.S.C. 1182(d)(5)(A). An alien who returns under advance parole is a parolee and, as such, is subject to exclusion, rather than deportation, proceedings. Matter of Torres, 19 I&N Dec. 371 (BIA 1986).

We note that the Fourth and Ninth Circuits have held that an applicant for adjustment of status who travels abroad under advance parole while his or her application is pending is entitled to deportation proceedings, rather than exclusion proceedings, upon returning to the United States. Patel v. Landon, 739 F.2d 1455, 1457 (9th Cir. 1984); Joshi v. District Director, INS, 720 F.2d 799, 800–3 (4th Cir. 1983). Neither of these cases controls this issue with respect to TPS aliens. First, the Board held in Torres, supra, that these cases are not to be followed outside the Fourth and Ninth Circuits. More fundamentally, each of these cases depended on the proper interpretation of 8 C.F.R. 245.2(a)(3) as it existed at the time of the courts' decisions. Patel and Joshi, supra. This regulation has since been amended. Torres, 19 I&N Dec. at 375 citing 51 F.R. 7431 (1986). The amended regulation, now codified at 8 C.F.R. 245.2(4)(ii) (1991), explicitly provides:

> The departure of an alien who is not under deportation proceedings shall be deemed an abandonment of his or her application constituting grounds for termination, unless the applicant was previously granted advance parole by the Service for such absence, and was inspected upon returning to the United States. If the application of an individual granted advance parole is subsequently denied, the applicant will be subject to the exclusion provisions of Section 236 of the Act. No alien granted advance parole and inspected upon return shall be entitled to a deportation proceeding.

(Emphasis added). Because of this amendment, the continuing vitality of Patel and Joshi is doubtful, even in the Fourth and Ninth Circuits.

If an alien departs the United States while deportation proceedings are pending, the Service may move to dismiss the proceedings. 8 C.F.R. 242.7(b). The Service should do so in those cases in which an alien who is in deportation proceedings travels abroad under advance parole after having been granted TPS. As noted, these aliens will be subject to exclusion, rather than deportation, proceedings following their return under the advance parole. Dismissal of proceedings because the alien has left the United States is without prejudice. Id. 242.7(b). Thus, the Service could commence deportation proceedings anew should the alien make an "entry" (e.g., without inspection), rather than being paroled, upon returning to the United States.

C. If an Alien Granted TPS Is Subject to a Final Deportation Order, the Alien's Departure from the United States Executes the Deportation Order

If an alien subject to a deportation order departs the United States, the departure executes the deportation order. See INA 101(g), 8 U.S.C. 1101(g); 8 C.F.R. 243.5. The alien, therefore, is considered to have been deported pursuant to law. Id. The Service may not forcibly execute a warrant of deportation against an alien granted TPS. Id. 244A(a)(1)(A), 8 U.S.C. 1254a(a)(1)(A). Neither this provision nor the special provisions for Salvadorans, Immigration Act of 1990 ("1990 Act"), Pub. L. No. 101-649, 303, 104 Stat. 4978, 5036 (1990), however, exempt a TPS alien from the legal consequences Section 101(g), should the alien leave the United States of his or her own volition. Thus, a TPS alien who departs the United States while a deportation order is in effect carries out his or her own deportation.

The alien is then subject to exclusion during the five year period immediately following the alien's departure. See INA 212(a)(6)(B), 8 U.S.C. 1182(a)(6)(B).[FN1] This consequence of the alien's departure need not, however, frustrate the alien's ability to travel abroad while in TPS. Under the regulations, all TPS aliens who travel abroad while in TPS do so under advance parole. 8 C.F.R. 240.15(a).[FN2] Congress has specifically provided that TPS aliens may obtain the Attorney General's permission to travel abroad. Id. 244A(f)(3), 8 U.S.C. 1254a(f)(3). The fact that the alien is excludable under Section 212(a)(6)(B) does not preclude the alien's parole upon returning from abroad. Id. 212(d)(5)(A), 8 U.S.C. 1182(d)(5). It would, therefore, be "strictly in the public interest," id., to parole these aliens.

A different issue arises if the TPS alien travels abroad under advance parole in order to obtain an immigrant visa. While Section 212(a)(6)(B) does not preclude parole, this provision does preclude issuing a visa to an alien who has been deported within the 5 years preceding the application for a visa. This amenability to exclusion is absolved, however, if the alien obtains the Attorney General's consent to apply for admission prior to embarking for the United States. INA 212(a)(6)(B), 8 U.S.C. 1182(a)(6)(B). By regulation, the alien may seek this consent before leaving the United States to apply for an immigrant visa. 8 C.F.R. 212.2(j). If the alien does not seek this consent prior to departure, the alien may file an application for consent to apply for admission while abroad. Id. 212.2(d). The alien may even seek this consent, nunc pro tunc "to the date on which the alien embarked or reembarked at a place outside the United States," when he or she arrives at the port of entry 8 C.F.R. 212.2(f) and (i).

When the Service receives an advance parole request from a TPS alien whose departure will execute a deportation order, it would be reasonable and appropriate for the Service to suggest that the alien apply concurrently for consent to apply for admission within the 5 years after departure. The Service may also want to expedite the adjudication of the ap-

plication, so as not to delay unduly the alien's opportunity to apply for a visa abroad. Expedited adjudication would be especially appropriate for aliens who will seek sixth preference visas as unskilled laborers. See INA 203(a)(6), 8 U.S.C. 1153(a)(6) (1988). Effective October 1, 1991, only 10,000 unskilled laborers may be admitted for permanent residence in each fiscal year. 1990 Act, 121(a), 104 Stat. at 4989. Thus, a delay in adjudicating the application for consent to apply for admission after deportation could delay, or even foreclose, the ability of the alien to obtain an immigrant visa and to seek admission as a permanent resident.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-50

Use of Service fax machines to file employment applications

Marylou Whelan, Director, Personnel Division

June 17, 1991

I. QUESTION PRESENTED

Whether the Immigration and Naturalization Service (INS) may allow its employees to use agency owned fax machines to file employment applications for positions announced through the merit promotion plans.

II. SUMMARY ANSWER

The INS may allow its employees to use agency owned fax machines to file employment applications for positions within the INS. Prior to granting permission, an appropriate agency official must deem this practice to be a legitimate business expense.

III. DISCUSSION

Government employees are prohibited from directly or indirectly using or allowing the use of Government property for other than "officially approved activities." See 5 C.F.R. 735.205 (1991). The Office of Personnel Management (OPM) has determined that the use of a postage paid agency envelope by a Government employee to mail an employment application is not an officially approved activity. In reaching this conclusion OPM relied on 39 U.S.C. 415, which specifically prohibits an officer or employee of an executive department from mailing any article or document unless it is reasonably related to the subject matter of official correspondence, and 18 U.S.C. 1719, which imposes a criminal penalty for private use of an official envelope, label or endorsement. Consequently, using a postage paid agency envelope is not an officially approved activity because it is specifically prohibited by 39 U.S.C. 415 and 18 U.S.C. 1719.

In the instant situation, there is no specific statutory or regulatory prohibition forbidding the use of an agency owned fax machine to file an employment application. OPM has advised us that the INS may allow its employees to use agency owned fax machines to file employment applications for positions within the INS so long as an appropriate official within the INS determines that this practice is a legitimate business expense. This determination would be noted in the Administrative Manual and the vacancy announcements.

The decision to allow agency owned fax machines to be used to file employment applications can be readily justified

as a legitimate business expense. Under the current system, the INS waits five working days following the closing date of the vacancy announcement to begin processing applications. The five working day waiting period was implemented so that all applications which were postmarked by the filing deadline could be considered. By allowing its employees to file employment applications by the use of fax machines, the INS could reduce the five working day delay and therefore fill a vacant position in a more timely manner. Streamlining the hiring process would reduce costs associated with unfilled positions, i.e. money spent on employee details or overtime. Therefore, providing to its employees the use of an agency owned fax machine is a legitimate business expense.

IV. CONCLUSION

INS employees may be permitted to use agency owned fax machines to file employment applications inasmuch as this practice would be a legitimate business expense.

/s/ Paul W. Virtue
Acting

Genco Opinion 91-51

Legal Opinion: Classification of Buses Under INS Appropriation Statutes

James A. Kennedy, Assistant Commissioner, Administration

CO 1804-P

June 17, 1991

QUESTIONS

What is the proper classification of buses under Immigration and Naturalization Service (INS) appropriation statutes, and do either of those statutes or applicable regulations limit the number of buses which INS can purchase?

SUMMARY CONCLUSION

Buses are classified as "passenger motor vehicles" under current INS appropriation statutes. Neither these statutes nor applicable regulations limit the number of such vehicles which INS can purchase.

ANALYSIS

I. Background

Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations, 1990, P.L. 101-162, Title II, 103 Stat. 995, (1989), establishes the nature and amount of appropriations available to INS for Fiscal Year 1990.[FN1] The relevant language reads as follows:

For expenses, not otherwise provided for, necessary for the administration and enforcement of the laws relating to

immigration, naturalization and alien registration, including not to exceed to meet unforeseen emergencies of a confidential character, to be expended under the direction of the Attorney General and accounted for solely on his certificate; purchase for police-type use (not to exceed 620, for replacement only) without regard to the general purchase price limitation for the current fiscal year, and hire of passenger motor vehicles; acquisition, lease, maintenance and operation of aircraft; and research related to immigration enforcement; $828,300,000, of which not to exceed $400,000 for research shall remain available until expended: Provided, That none of the funds available to the Immigration and Naturalization Service shall be available for administrative expenses to pay any employee overtime pay in an amount in excess of $25,000: Provided further, That uniforms may be purchased without regard to the general purchase price limitation for the current fiscal year: Provided further, That for fiscal year 1990 and hereafter capital assets acquired by the Immigration Legalization account may be made available for the general use of the Immigration and Naturalization Service after they are no longer need for immigration legalization purposes; Provided further, That title 8, United States Code, Section 1356(n) is amended by deleting "in excess of $50,000,000" after "Immigration Examinations Fee Account: and by deleting "At least annually deposits in the amount of $50,000,000 shall be transmitted from the 'Immigration Examinations Fee Account' to the General Fund of the Treasury of the United States": Provided further, That not to exceed $5,000 shall be available for official reception and representation expenses.

II. Analysis

There is no limit in the Fiscal Year 1990 appropriation on the number of buses that INS may purchase, but there is a limit on its purchase of "police-type" vehicles. This appropriation also exempts police-type vehicles from the purchase price cap contained in the Treasury, Postal Service and General Government Appropriations Act, 1990, P.L. 101-136, 103 Stat. 816, (1989). The applicable language is as follows:

Section 601: Unless otherwise specifically provided, the maximum amount allowable during the current fiscal year in accordance with Section 16 of the Act of August 2, 1946 (60 Stat. 810) for the purchase of any passenger motor vehicle (exclusive of buses and ambulances), is hereby fixed at $7,100 except station wagons for which the maximum shall be $8,100:

The language of Section 601 indicates that buses and ambulances are passenger motor vehicles. It is silent as to the number of vehicles which INS may purchase, but sets a purchase price limit of $7,100 for regular passenger motor vehicles, and one of $8,100 for station wagons. It exempts buses and ambulances from this limit but is silent on the number of these vehicles that INS may purchase.

We also examined Government-Administrative Expenses, P.L. 600, Chap. 744, 16, 60 Stat. 810 (1946), the statute which is referenced in Section 601. It contains a general prohibition against acquiring passenger motor vehicles without specific authority and prohibits spending more than an authorized amount for each vehicle. This statute also (1) treats buses and ambulances as passenger motor vehicles, (2) is silent about the number of such vehicles which INS may purchase, and (3) exempts buses and ambulances from the price caps. Thus the number of passenger motor vehicles, including buses, that INS may buy is limited only by the amount of funding that is available for this purpose unless there are regulations imposing such limits.

We found no such regulations. We examined the relevant sections of the INS Administrative Manual (3701 to 3708 covering Motor Vehicle Fleet Management), and applicable General Services Administration vehicle acquisition regulations. These regulations govern the definition of certain classes of vehicles, requirements for fuel efficiency, vehicle acquisition procedures, vehicle identification requirements, limitations on the use of official vehicles, etc. None contained

any limitation on the number of vehicles that INS may purchase.[FN3]

CONCLUSION

Buses must be considered passenger motor vehicles under the INS appropriation statute, however, the statute does not limit either the number of such vehicles which INS may purchase, or the amount which it may pay for each vehicle.

Should you have any questions, please contact Michael J. Coster on extension 4-2895.

/s/ Paul W. Virtue

Acting

Genco Opinion 91-52

Employment Eligibility Verification Requirements

Lawrence Weinig, Deputy Assistant Commissioner, Adjudications

CO 274A

June 17, 1991

The Office of the General Counsel has been asked by the Office of Examinations, Adjudications Branch, to assist in responding to a request for a Legal Opinion concerning the responsibilities of an employer who becomes aware of an employee's previous unauthorized work status. This memorandum represents the opinion of the Office of the General Counsel and is being forwarded to your office so that you may respond to Mr. —. Attached please find the request for a Legal Opinion from Mr. —.

I. ISSUE

If an employee informs his employer that he presented identity and employment eligibility documents under an assumed name because he was not authorized to work when he was hired after November 6, 1986, but the employee now presents valid identity and employment eligibility documents which reasonably appear on their face to be genuine and to relate to him, does the employer have an obligation to seek further proof of the genuineness of these documents because of the previous misrepresentation?

II. SUMMARY CONCLUSION

An employer does not need to seek further proof of the genuineness of identity and employment eligibility documents unless certain facts or circumstances exist that would lead the employer to reasonably believe that the second set of documents presented are not genuine or do not relate to the individual presenting them.

III. LEGAL ANALYSIS

The Immigration and Nationality Act, as amended, makes it unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien. Section 274A(a)(1)(A) of the Act; 8 U.S.C. 1324a(a)(1)(A). It is also unlawful for a person or other entity, after hiring an alien for employment, to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment. Section 274A(a)(2); 8 U.S.C. 1324a(a)(2). Finally, it is also unlawful for a

person or other entity to hire for employment (and to recruit or refer for a fee in the case of agricultural associations, agricultural employers, and farm labor contractors) in the United States an individual without complying with the employment eligibility verification requirements. Section 274A(a)(1)(B) and (b) of the Act; 8 U.S.C. 1324a(a)(1)(B) and (b).

A person or entity will be deemed to have complied with the employment verification requirements with respect to examination of a document if the document reasonably appears on its face to be genuine and to relate to the individual. Section 274A(b)(1)(A); 8 U.S.C. 1324a(b)(1); 8 C.F.R. 274a.(2)(b)(1)(ii)(A). It is an unfair immigration-related employment practice for an employer to request more or different documents than are required under Section 274A of the Act or refuse to honor documents tendered that on their face reasonably appear to be genuine. Section 274B(a)(6); 8 U.S.C. 1324b(a)(6).

In the situation presented by Mr. —, an employer would not have an obligation to seek further proof of the genuineness of documents presented by an employee who had previously presented documents under an assumed name unless certain facts or circumstances existed that would lead the employer to reasonably believe that the documents presented are not genuine or do not relate to the individual presenting them. An employer need not, and indeed cannot, request that an employee present more or different documents or refuse to honor documents which reasonably appear to be genuine.

In addition, the employer has established a rebuttable affirmative defense to a charge of knowingly hiring an unauthorized alien if he complied in good faith with the employment eligibility verification requirements at the time of the initial hire by properly completing the Form I-9. Section 274A(a)(3); 8 U.S.C. 1324a(a)(3); 8 C.F.R. 274a.4. The employer in the situation described above could complete a new Form I-9 for the employee after examining the newly presented documents, note the reasons why the new form was completed, and retain the original Form I-9 to evidence timely completion.

We hope this opinion will assist Mr. — in his attempt to provide legal advice to his client.

/s/ Paul W. Virtue

Acting

Genco Opinion 91-53

Legal Opinion: Your CO 243.69 of May 16, 1991; —, PRC National

Joan C. Higgins, CODDP

CO 243.69

June 20, 1991

QUESTION

You have requested a Legal Opinion regarding whether or not the subject alien may be deported to the People's Republic of China (PRC).

SUMMARY CONCLUSION

The departure of this alien may not be enforced until January 1, 1994. However, this does not mean that the Immigration and Naturalization Service must prevent his unenforced departure if the alien's legal representative requests that he

be permitted to depart.

ANALYSIS

This Alien Is a National of the People's Republic of China who was In the United States After June 5, 1989

— is a PRC national who entered the United States on March 10, 1989, as a B-1 visitor for business. He was authorized, with extensions, to remain in the United States until October 15, 1989. He changed his status to an F-1 student on August 23, 1989, but ceased attending school in March 1990.

On July 17, 1990, he was arrested and charged with the murder of his wife and her supervisor, who was a United States citizen. Mr. — had also attempted suicide by shooting himself in the head. He was completely blinded. He has been held to be mentally incompetent to stand trial and found to be unlikely to become competent. He is in need of intensive rehabilitation due to the major brain damage he has sustained, and has been described by a forensic psychiatrist as suffering from "a severe memory loss, reduced ability to calculate, aphasia (an inability to communicate his thoughts and words), and mental confusion." The Assistant District Director for Detention and Deportation in Atlanta, Georgia, believes he is probably incapable of making an independent decision whether to return to China.

On March 19, 1991, an immigration judge ordered this alien deported on the basis of a stipulation between the Immigration and Naturalization Service and the alien's counsel that

- the alien had been served with an order to show cause,
- his rights had been explained and were understood,
- that he was detained and wished the adjudication to be expedited,
- he admitted the allegations in the order to show cause and conceded deportability,
- he was not seeking relief from deportation and designated the country of citizenship as the place of deportation, and
- he waived the right to appeal.

Someone named —, writing on the letterhead of the Huaneng Coal Corporation, Beijing, China, to the subject's immigration counsel, has asked for information regarding the subject's return to China. This person may be related to the subject. It is reported that counsel for the alien has been in contact with the alien's family in China and that they want to look after him at home. This Alien Is Covered by Executive Order No. 12,711 and, Therefore, His Departure May Not Be Enforced Until January 1, 1994

On April 11, 1990, President Bush issued an executive order in which he ordered the Attorney General to take the necessary steps "to defer until January 1, 1994, the enforced departure of all nationals of the People's Republic of China (PRC) and their dependents who were in the United States on or after June 5, 1989, up to and including the date of this order … ." Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (1990), reprinted in 8 U.S.C. 1101 app. at 28 (1991).

On August 14, 1990, Commissioner McNary issued a wire to all regional commissioners, all district directors (including foreign), all officers in charge, all chief patrol agents, all regional service center directors, Glynco, all regional counsel, all district counsel, and all sector counsel, in which he referred to the above Executive Order. He said that it "applies to all PRC nationals and their dependents (including non-PRC dependents) in the United States after June 5, 1989, up to and including April 11, 1990." Wire, p. 1. He also stated: "In all cases where a final order of deportation has been entered, departure shall not be enforced before January 1, 1994." Id., at 10. We know of no exceptions to the Executive Order or the implementing instructions.

— was in the United States after June 5, 1989 and has remained here since that time. He is, therefore, covered by Executive Order No. 12,711. Consequently, his departure may not be enforced. However, this does not mean that his departure must be prevented if all of the appropriate parties desire his departure and if —'s counsel provides the Service with a signed statement that he has been advised of the Executive Order and nevertheless seeks permission for —'s departure as —'s legal representative.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-54

Parking Ticket Adjudication

James Kennedy, Assistant Commissioner, Administration

July 22, 1991

Attention: Rannie R. Joyce, General Services Branch

I. QUESTION

Can appropriated funds be used to pay a parking ticket fine received by an employee of the Immigration and Naturalization Service ("Agency") while making a delivery for the Commissioner using a leased official vehicle?

II. ANSWER

Yes. Although payment of a parking ticket is the personal responsibility of the employee whose action warrants its receipt, the Agency is liable to the car lessor for payment of any outstanding fines on a contractual liability theory. Therefore, if the employee refuses to pay the fine, appropriated funds can be used.

The Agency can seek to collect the amount of the fine paid from the employee.

III. ANALYSIS

A. Background. In the situation under review, an Agency employee "double-parked" in a no stopping/standing/PM Rush zone. The Bureau of Traffic Adjudication for the District of Columbia refused to dismiss the citation because the employee failed to comply with guidelines for parking while on Government business. The employee has sought payment of the fine by the Agency.

B. Analysis. The Agency, as an entity of the United States, is generally free from state regulation absent clear and unambiguous law to the contrary.[FN1] This immunity extends, in most instances, to employees acting within the scope of their official duties. The scope of official duties of this employee does not include violation of a city ordinance. The fine imposed upon him for parking illegally while driving a government vehicle is his personal responsibility.

However, the car that this employee was driving was leased. This employee has not paid the ticket, and does not indicate that he intends to do so. The owner of the vehicle may ultimately bear the responsibility for payment because the car cannot be registered as required under the law of the District of Columbia with any outstanding fines. Further, review of this lease contract reveals that the Department of Justice has agreed to "indemnify and hold the Contractor harmless against any and all such fines … ".

If the lessor had, within thirty days of notification, contacted the Traffic Bureau with information indicating that the ticketed car was leased to the Department, no liability would have attached to the lessor, or subsequently to the Agency.[FN2] That was not done. It is and remains the standard practice for this lessor to merely forward the ticket to the Agency to whom the car is leased.

Therefore, under a contractual liability theory, if the employee refuses to pay this ticket, the terms of the contract would require Agency payment. If the employee continues to refuse to pay the fine imposed upon him, appropriated funds can properly be used to adhere with the terms of the lease.

Section 3703.05 of the INS Administrative Manual states that an employee may not be relieved of responsibility for moving or parking violations.[FN3] We interpret this to mean the cost of the fine imposed. Therefore, the Agency may collect the amount of the fine from the employee.[FN4]

In any event, the employee should be advised of the applicable regulations and administrative provisions of the District of Columbia and the Department of Justice to prevent a similar occurrence in the future.

If you should require additional information in this area, please contact Sandra B. March, Assistant General Counsel, at 514-1260.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-55

INS Authority Under 8 U.S.C. 1323 to Collect the Cost of Transportation Incurred by Aliens not Admitted to the United States

Michael Cronin, Assistant Commissioner, Inspections

CO 271-C

July 23, 1991

I. QUESTION PRESENTED

May the Immigration and Naturalization Service (INS), pursuant to 8 U.S.C. 1323 (section 273 of the Immigration and Nationality Act (INA)), collect from a carrier the cost of transportation incurred by an alien not admitted to the United States because he or she fails to present a valid unexpired passport and visa (when a visa is required)?

II. SUMMARY ANSWER

Yes. 8 U.S.C. 1323(b) gives INS the authority to collect the cost of transportation incurred by an alien not admitted to the United States because he or she fails to present a valid unexpired passport and visa (if a visa is required) from the carrier responsible for transporting the alien to the United States.

III. BACKGROUND

8 U.S.C. 1323(a) makes it unlawful for "any person … to bring to the United States from any place outside thereof (other than from foreign contiguous territory) any alien who does not have a valid passport and an unexpired visa, if a visa was required under this Act or regulations issued thereunder." Subsection (b) provides that any person who violates this prohibition "shall pay to the Commissioner [of the INS] the sum of $3,000 for each alien so brought and, except in the case of any such alien who is admitted, or permitted to land temporarily, in addition, a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival … ." Prior to

Congress's passage of the Immigration Act of 1990 (IMMACT), the statute required carriers to make these payments to "the collector of customs." Unfortunately, in what appears to be an oversight, Congress did not make a corresponding amendment to the language providing that the latter amounts described above are "to be delivered by the collector of customs to the alien on whose account the assessment is made."

It has recently come to your attention that INS is not collecting the costs relating to transportation and therefore may not be fulfilling its statutory responsibilities. You are concerned that ignoring "this provision would appear to weaken our overall fines posture as it would appear that the Service is deciding which provisions of the Act it wishes to enforce and which it chooses not to."

IV. DISCUSSION

The exact wording of 8 U.S.C. 1323(b) quoted above places a burden on the carriers to pay the sums indicated rather than on the Commissioner to collect them. It goes on to provide, however, that [n]o vessel or aircraft shall be granted clearance pending the determination of the liability to the payment of such sums while such sums remain unpaid … ." Thus it seems clear that INS has a responsibility to collect both the $3,000 fine for each alien and the transportation costs. It therefore should begin collecting these amounts immediately.

It also seems clear that Congress intended that INS take over the function of paying these transportation costs to the alien as well as that of collecting them. Formerly the statute charged the collector of customs with both collecting the monies and paying them to the aliens; it makes no sense to divide these tasks. Unfortunately, Congress inadvertently left some references to the collector of customs in the 1990 amendments to the INA. The above language was apparently one of them. We think this failure was simply an oversight. It is our understanding that the United States Customs Service is not collecting such monies. The technical amendments to IMMACT have been sent to Congress. They will correct these remaining references to the collector of customs. Therefore it is our view that INS should not only be collecting these monies but also paying them to the aliens involved.

IV. CONCLUSION

8 U.S.C. 1323(b) places a clear, unambiguous duty on the Commissioner of the INS to (1) collect a $3,000 fine for each alien brought to this country in violation of 8 U.S.C. 1323(a), (2) collect an amount equal to that the alien paid for his transportation, and (3) pay the latter amount to the alien in question.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-56

Legal Opinion Fiances or fiancees who marry later than 90 days after entry

James A. Puleo, Associate Commissioner, Examinations

CO 245-C

July 24, 1991

ATTN: Yolanda Sanchez-K., Senior Immigration Examiner

I. QUESTION

This Legal Opinion addresses the following question: If the marriage between an alien fiance or fiancee and a citizen petitioner does not occur until more than 90 days have elapsed since the alien's admission, is there any basis upon which the alien may obtain permanent residence through adjustment of status?

II. SUMMARY CONCLUSION

The alien may not adjust, on the basis of his or her admission under Section 101(a)(15)(K), if the alien marries the citizen petitioner more than 90 days after entry. The citizen may, however, file an alien relative visa petition (Form I-130) after the untimely marriage. Once the petition is approved, the alien may then apply for adjustment of status.

III. ANALYSIS

The Immigration and Nationality Act of 1952, as amended, creates a nonimmigrant classification for the alien fiance or fiancee of a United States citizen. INA 101(a)(15)(K), 8 U.S.C. 1101(a)(15)(K). In order to qualify for entry, the alien fiance or fiancee must be seeking to enter the United States "solely to conclude a valid marriage with the petitioner within ninety days after entry." Id. The alien's minor children may also be admitted, if they accompany or follow to join the alien. Id. The aliens are precluded from changing to a different nonimmigrant classification. Id. 248(1), 8 U.S.C. 1258(1). The alien fiance or fiancee's failure to marry the petitioner within three months of entry renders the alien fiance or fiancee, and any alien minor children, amenable to deportation from the United States. Id. 214(d), 8 U.S.C. 1184(d).

The Service may not adjust the status of an alien fiance or fiancee to permanent residence, except on the basis of the alien's subsequent marriage to the citizen petitioner. Id. 245(d), 8 U.S.C. 1255(d). The regulation implementing this provision is codified at 8 C.F.R. 245.1(b)(13). As currently written, Section 245.1(b)(13) appears to bar adjustment entirely, unless the alien fiance or fiancee and the citizen petitioner marry within 90 days of the alien's entry. Section 245(d) of the INA, on which Section 245.1(b)(13) is based, does not include this 90-day time limit. The alien may not be admitted as a fiance or fiancee, however, unless the alien and the citizen petitioner intend to marry within 90 days of the alien's entry. INA 101(a)(15)(K), 8 U.S.C. 1101(a)(15)(K). The alien becomes deportable if the couple does not marry within three months of entry. Id. 214(d), 8 U.S.C. 1184(d). Section 245.1(b)(13), therefore, is a reasonable interpretation of the fiance/fiancee provisions read as a whole.

The Service has recently become aware of cases in which the alien and citizen married, but the marriage took place more than 90 days after the alien's entry. In one case, for example, the couple delayed their marriage after the death of one of their parents. Another potential problem involves alien fiances and fiancees of members of the Armed Forces deployed abroad for Operations Desert Shield and Desert Storm. The situations raise the question of whether an alien fiance's untimely marriage constitutes an insurmountable bar to the alien's adjustment.

Moss v. INS, 651 F.2d 1091 (5th Cir. 1981), presents a possible solution to this dilemma. In Moss, the alien and citizen had married 92 days after the alien's admission. In deportation proceedings, the alien attempted to present before the immigration judge evidence that illness intervened to delay the scheduled marriage. The immigration judge refused to admit the evidence, and the Board affirmed the resulting deportation order. The court held that the alien was entitled to present the evidence, and that Section 214(d) would not apply if the alien was successful in establishing a reasonable explanation for the failure to marry within the prescribed period. The court of appeals based its decision on the imprecise language of Section 214(d). 651 F.2d at 1093, n. 4. Under the statute, the couple must marry within "90 days," but the alien is deportable only if the marriage does not occur within "three months." The court noted that almost any "three month" period will exceed "90 days." Id.

The court, however, cited no authority that supports its creation of an "unforeseen circumstances" exception to the requirement that an alien fiance and citizen petitioner marry within 90 days of the alien's entry. 651 F.2d at 1093. The

court did refer to Menezes v. INS, 601 F.2d 1028 (9th Cir. 1979), but this case did not involve the legal consequence of an alien fiance's failure to marry within the time allowed by law. Since courts lack authority to alter deadlines set by Congress, INS v. Pangilinan, 485 U.S. 875 (1988), we conclude that an alien fiance or fiancee may not adjust, based on his or her admission under sections 101(a)(15)(K) and 214(d), if the alien marries the citizen petitioner more than 90 days after the alien's admission.

An untimely marriage, however, need not be an insurmountable bar to the alien's adjustment. The Service may not adjust the alien's status "except to that of an alien lawfully admitted to the United States on a conditional basis … as a result of the marriage of the nonimmigrant … to the citizen who filed the petition to accord that alien's nonimmigrant status under Section 101(a)(15)(K)." INA 245(d), 8 U.S.C. 1255(d). The alien clearly may not seek adjustment under the preference system, nor on the basis of a marriage to a different citizen. Id. Section 245(d) of the Act, however, does not clearly preclude the citizen petitioner from filing a new visa petition on the alien's behalf after the untimely marriage. Approval of the citizen spouse's alien relative visa petition would qualify the alien spouse as an "immediate relative." Id. 204, 8 U.S.C. 1184.[FN1] The alien could then apply for adjustment, notwithstanding the fact that the failure to marry within the time allowed by Section 214(d) renders the alien's status unlawful. Id. 245(c)(2), 8 U.S.C. 1255(c)(2). Since the alien's adjustment would still be based upon his or her marriage to the citizen petitioner, Section 245(d) would not clearly bar the alien's adjustment.

Section 245.1(b)(13) of the regulations would not prohibit the adjustment either. As noted, this regulation appears to prohibit the alien's adjustment absolutely if the marriage is untimely. This aspect of Section 245.1(b)(13), however, is not strictly required by the text of Section 245(d) of the Act. We recommend, therefore, that the Service interpret Section 245.1(b)(13) narrowly, so that it applies to the alien's adjustment as a now-married fiance or fiancee, but does not preclude the alien's adjustment based on a new visa petition (Form I-130) filed by the citizen spouse after the untimely marriage. Since the alien may only be adjusted as a conditional permanent residence under Section 216 of the Act, INA 245(d), 8 U.S.C. 1255(d), the alien would have to apply for adjustment within two years of his or her marriage, see id. 216(a)(1) and (g)(1), 8 U.S.C. 1186a(a)(1) and (g)(1).

Our conclusion involves an interpretation of an existing regulation. It is not, strictly speaking, necessary to amend Section 245.1(b)(13) in order to implement this interpretation. If the Service decides to adopt our recommendation, however, it would be prudent to amend Section 245.1(b)(13) accordingly. Doing so will help ensure uniformity of practice. We have, therefore, enclosed a draft amendment to this regulation that conforms to our recommendation.

/s/ GROVER JOSEPH REES III
General Counsel
Enclosure

Genco Opinion 91-57

Legal Opinion: Acquisition of Forfeited Vehicles and the Vehicle Acquisition Ceiling

James A. Kennedy, Assistant Commissioner, Administration

CO 924

July 25, 1991

ISSUE

In our opinion of March 19, 1990 (Attachment A), we concluded that INS vehicles acquired via forfeiture procedures need not be counted against vehicle purchase ceilings. By memorandum dated October 12, 1990 (Attachment B), you indicated that, in light of your reservations on the matter, you will continue to count such vehicles against purchase ceilings.

SUMMARY CONCLUSION

While there is no restriction on your adopting a more conservative approach than required by law and regulation, forfeited vehicles need not be counted against vehicle purchase ceilings.

ANALYSIS

I. Background

We determined in our March 19, 1990, opinion that forfeited vehicles need not be counted against the purchase ceiling. You then consulted the Justice Management Division (JMD). They issued an interim opinion dated September 18, 1990 (Attachment C). Despite the fact that JMD agreed with our position, you wrote (Attachment B) to this office indicating that you would continue counting forfeited vehicles against the purchase ceiling. We have reexamined this issue in light of your memorandum and wish to clarify certain points.

II. Discussion

A. 'Seized' v. 'Forfeited'

In your memorandum you expressed a belief that since the JMD memorandum referred to "seized" vehicles rather than "forfeited" vehicles, it did not answer your question. This a distinction without a difference for purposes of this issue. The misunderstanding lies in the use of the terms "seized" and "forfeited." While these terms do not have the same meaning, they are often used as equivalents. For example, in our memorandum, our subject line refers to "seized vehicles," while our conclusion, more correctly, refers to "forfeited vehicles." The JMD memorandum is apparently using the terms "seized" and "forfeited" in the same manner. Strictly speaking, the government must take further action before a seized vehicle becomes a forfeited one. It cannot appropriate a vehicle for its own use or otherwise dispose of it until it completes the forfeiture procedure.

B. The JMD Memorandum Concurred With Our Opinion

We believe that the JMD memorandum does answer your question and that it concurs with our opinion. While it does not specifically mention the issue of counting forfeited vehicles against the purchase ceiling, it does make a broader statement which includes this concept: "We are of the view that as a general matter neither the appropriations ceiling nor the statute limiting the acquisition of passenger motor vehicles, 31 U.S.C. 1343, would limit the authority under various seizure statutes to placed seized vehicles into official use." We read this statement as meaning that neither the appropriation ceilings nor limits on vehicle purchases constitute limits on the acquisition of vehicles as a result of forfeiture procedures.

CONCLUSION

We have reviewed our previous opinion and we continue to conclude that forfeited vehicles need not be counted

against the purchase ceiling. This opinion does not, of course, affect your authority to place internal limitations on the size of the agency fleet which may include forfeited or any other vehicles.

Should you have any questions, please feel free to call Nilza F. Velazquez, Assistant General Counsel, on extension 4-1260.

/s/ GROVER JOSEPH REES III
General Counsel
Attachments

Genco Opinion 91-58

Legal Opinion: Validity of Iranian Mosque Marriages Performed in Turkey

R. Michael Miller, Deputy Asst. Commissioner, (COADN)

CO 831

July 25, 1991

I. QUESTION

You have asked whether INS should follow the Department of State (DOS) or the Northern Service Center (NSC) interpretation of the validity of Iranian mosque marriages performed in Turkey.

II. SUMMARY CONCLUSION

The DOS interpretation should be followed. An Iranian mosque marriage performed in Turkey is not valid under Turkish law and may not be given validity by INS for granting United States immigrant visas. However, the defect may be cured by a subsequent civil marriage performed in a consulate or other place recognized by Turkish authorities. The visa preference date may be established only upon filing of an approved visa petition, based on the civil ceremony.

III. ANALYSIS

The validity of a marriage for immigration purposes is generally governed by the law of the place of celebration of the marriage. Matter of Gamero, 14 I. & N. Dec. 674 (BIA 1974); Matter of Levine, 13 I. & N. Dec. 244 (BIA 1969); Adams v. Howerton, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982); Matter of Luna, 18 I. & N. Dec. 385 (BIA 1983); Matter of Batista, 16 I. & N. Dec. 602 (BIA 1978); Matter of Arenas, 15 I. & N. Dec. 174 (BIA 1975); Matter of P—, 4 I. & N. Dec. 610 (BIA, Acting A.G. 1952); Matter of Hosseinian, Int. Dec. #3030 (BIA 1987). Turkey has been a secular state since 1923, and under its present laws only legally recognizes civil ceremony marriages of its citizens. A diplomatic note dated May 1990 from the Turkish Ministry of Foreign Affairs to the American Embassy Ankara stated that marriages between two foreigners performed solely at their consulates or consular sections would be accepted as valid by Turkish authorities, but that Iranian mosque marriages are considered void in Turkey. Thus, Iranian mosque marriages of Iranians in Turkey are void ab initio.

Under long-standing federal regulations of both the Department of State and the Department of Justice, the priority date for issuance of a preference immigrant visa is established by the filing date of an approved preference visa petition.

22 C.F.R. 42.53(a); 8 C.F.R. 245.1(f)(2). The alien must be qualified at the time the petition is filed, at least in the case of preference visa petitions for alien professionals and laborers. Matter of Katigbak, 14 I&N 45 (Reg. Com. 1971); Matter of Wing's Tea House, 16 I&N 158 (Reg. Com. 1977). See also Matter of Great Wall, 16 I&N 142 (Reg. Com. 1977). Cited in Matter of Bardouille, 18 I&N 114 (BIA 1981).

Qualifying facts which come into being subsequent to the filing of a preference visa petition may not considered, since to do so would result in granting the beneficiary a visa priority date at a time when he was not qualified for the preference classification sought. Katigbak, 14 I&N at 49. Therefore, the date of an Iranian mosque marriage which took place in Turkey cannot be used as the preference date for granting an immigrant visa.

The issue of domicile does not come into play in most Iranian mosque marriage cases, since under conflict of laws principles the domicile of a party is generally considered in the issue of validity of a divorce, and not the validity of a marriage, the latter being governed by the law of the place of celebration of the marriage. RESTATEMENT OF CONFLICT OF LAWS 121, 131, 132 (1934).

Accordingly, we conclude that the mosque marriage is not valid under Turkish law and cannot be used as the basis for an immigrant visa.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-59

Legal Opinion Drug Testing of Detained Aliens

Joan Higgins, Assistant Commissioner, Detention and Deportation

CO 103

CO 235

CO 236

CO 242

CO 243

CO 287

July 27, 1991

ISSUES

1. Whether the consent of a detainee is necessary in order for INS to administer a drug test?

2. If the alien tests positive for illegal drugs, what are the INS' options?
3. What are the applicable privacy protections for aliens who test positive for drug use?

SUMMARY CONCLUSION

An alien detained by INS pursuant to sections 235, 236, 242 and 243 of the Immigration and Nationality Act (the Act) may constitutionally be tested for drugs without his/her consent, to meet security concerns of the detention facility. However, before commencing such testing, regulations should be implemented to reduce the risk of performing tests in a manner that courts may consider to be more intrusive on privacy than necessary.

Assuming, regulations are implemented and testing is commenced, if the alien tests positive for illegal drugs, DD&P should enter an incident report in the A-file, and should notify: 1) INS Investigations (which should in turn contact the US Attorney), 2) a physician, and 3) the INS trial attorney conducting the immigration court proceedings. The district director may, if the circumstances warrant, consider raising the amount of any existing bond. Information pertaining to the drug test is subject to the same Privacy Act and Freedom of Information Act protections applicable to any other individual record maintained by INS.

ANALYSIS

1. Whether the consent of an alien in custody is necessary in order for the INS to administer a drug test?

Virtually all courts ruling upon the constitutionality of compulsory urinalysis have held that it amounts to a search or seizure within the meaning of the Fourth Amendment. See e.g., Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987). Drug testing has survived Fourth Amendment challenges in a variety of contexts. Dunn v. White, 880 F.2d 1188 (10th Cir. 1989) (upholding mandatory AIDS blood testing of prison inmates); Rushton v. Neb. Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988) (upholding testing of nuclear plant employees); McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (upholding testing of prison guards with regular contact with prisoners); National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), cert. granted, — U.S. —, 108 S.Ct. 1072 (1988) (upholding testing of customs service officials); AFGE v. Dole, 670 F. Supp. 445 (D.D.C. 1987) (upholding testing of federal employees whose positions relate to health, safety, national security, or law enforcement), Mack v. U.S. FBI, 653 F. Supp. 70 (S.D.N.Y. 1986) (upholding testing of FBI agents); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) (upholding random urinalysis drug testing of state prisoners).

Courts have also held that the Fourth Amendment prohibition against unreasonable searches and seizures of detainees is not violated in cases of routine strip searches, given the security concerns within penal institutions. Daughtery v. Harris, 476 F.2d 292 (10th Cir.), cert. denied, 414 U.S. 872 (1973). In assessing the constitutionality of a non-consensual search, the Supreme Court will consider the scope of the intrusion on privacy, the manner and the place in which the search is conducted, the reason for the search and the relationship to the security concerns of the institution. Id.

INS likewise has a strong interest in maintaining security in its detention facilities. The Supreme Court has recognized that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." Bell v. Wolfish, 441 U.S. 520, 546 (1979). Since pretrial detainees may have their constitutional rights limited for security reasons, a fortiori, the same limitations would apply to INS detainees undergoing deportation/exclusion proceedings.

Absent regulations prescribing drug testing methodology, however, the INS risks performing such tests on detainees in a manner that the courts may consider more intrusive on privacy than necessary. Given the potential for embarrassment or indignity claimed by a detainee, clear regulations should be adopted before initiating such testing. The Bureau of Prisons has promulgated regulations, for example, authorizing wardens to conduct random urinalysis drug testing of those prisoners involved in community activities, those with a history of drug use, and those inmates specifically suspected of drug use. See 28 C.F.R. 550.30.

2. If the alien tests positive for illegal drugs what are INS' options? If an alien tests positive, INS detention officers should do the following:

a) Contact a physician. Because of the potential adverse health effects of illegal drug use, reasonable care would include consulting a physician, bearing in mind that medical records may not be disclosed by INS where disclosure constitutes a clearly unwarranted invasion of privacy. 5 U.S.C. 552(b)(6), 552a(b)(8);

b) Enter an incident report in the A-file. Such a report, contained in the INS administrative file, would constitute a relevant adverse discretionary factor during existing immigration court proceedings, where ancillary relief is at issue, including adjustment of status, I-601 waiver of excludability, suspension of deportation, Section 212(c) relief, voluntary departure, asylum, etc. Additionally, regardless of the status of the immigration court proceedings — whether calendared, pending appeal, or a final order has been entered—the trial attorney may consider introduction in evidence of copies of the test results or incident report to oppose relief sought or motions submitted. A positive drug test, without more, would be insufficient to sustain a new ground of excludability under Section 212(a)(23) of the Act (alien believed to be an illicit trafficker), or to establish another basis for deportability under Section 241(a)(4)(B) or 241(a)(11) of the Act, (conviction required, or a showing that respondent is a drug addict, respectively). The incident report would be particularly relevant, whether prosecution is initiated or not, as an adverse discretionary factor in immigration court proceedings where discretionary relief may be sought;

c) Contact the trial attorney. The trial attorney conducting immigration court proceedings should be alerted for the reasons stated in (b) above;

d) Contact INS Investigations. Inasmuch as a positive drug test result reveals possible criminal misconduct, the INS investigations branch should b e contacted so that a criminal investigation and/or prosecution may be ultimately considered by the U.S. Attorney's office. The U.S. Attorney may also advise Investigations whether the State prosecutor's office should be notified. The chain of custody evidentiary rule should be observed by DD&P in order that the results may be introduced at trial as may be necessary. Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987); U.S. v. Howard-Arias, 679 F.2d 363 (4th Cir. 1982); and

e) If the alien is in custody due to his/her present inability to satisfy the amount of bond set, and not due to the mandatory detention provisions for an aggravated felony, the district director may wish to consider revoking, in order to raise, the bond amount if the circumstances warrant. See 8 C.F.R. 242.2(e) (revocation of bond "at any time" in the discretion of the district director).

3. What are the applicable privacy protections for aliens who test positive for drug use?

All INS records pertaining to U.S. citizens and lawful permanent resident detainees are protected by the Privacy Act, 5 U.S.C. 552a. The information contained therein may not be released to any person other than the subject to whom it relates unless authorized by that subject, except under certain specified circumstances. 5 U.S.C. 552a(b). Among the exceptions are disclosures to persons "pursuant to a showing of compelling circumstances affecting the health or safety of an individual", 5 U.S.C. 552a(b)(8), and to other authorized government agencies. 5 U.S.C. 552a(b)(7). Regulations of the Service implementing the Privacy Act, Pub. L. 93-597, are located at 8 C.F.R. 103.20 through 103.36. Violations of the Privacy Act may subject the United States to civil damages and the releasing officer to criminal liability. 5 U.S.C. 552a(g) and (i). Requests for information under the Privacy Act are referred to trained INS FOIA/PA personnel and handled on a case-by-case basis. 8 C.F.R. 103.21(a).

In the case of aliens other than lawful permanent residents, any request for information in their files are governed by the Freedom of Information Act, 5 U.S.C. 552, which provides for disclosure of government-held information subject to specified exemptions. One such exemption, provides that information contained in "personnel, medical and similar files" shall not be disclosed where the disclosure would constitute a clearly unwarranted invasion of privacy. 5 U.S.C. 552(b)(6). Other exemptions may apply, for example where the requestor is another agency. 5 U.S.C. 552a(b)(7). Any request for information may be referred to the FOIA/PA office within the district office.

/s/ Michael J. Creppy for WILLIAM P. COOK

General Counsel

Genco Opinion 91-60

Legal Opinion: Whether a carrier, signatory to an agreement under Section 238, may be fined under Section 271(a)

David Dixon, Appellate Counsel

CO 238-C

August 5, 1991

I. QUESTION

In connection with two appeals to the Board of Immigration Appeals, MIA 10/12.3793, MIA 88-90, and MIA 10/12.3794, MIA 88-91, involving Air Jamaica, you have asked whether a fine under Section 271(a) of the Immigration and Nationality Act (INA or Act) for failure to present aliens for inspection at the time and place designated by an immigration officer may be imposed against a carrier signatory to a contract under Section 238(c)[FN1] of the Act.

II. SUMMARY CONCLUSION

Section 238(c) of the Act authorizes the Attorney General to enter into contracts with transportation lines to guarantee the passage through the United States in immediate and continuous transit of aliens destined to foreign countries (aliens in transit without visa—TWOV's). The aliens involved in these cases were TWOV's.

The express terms of 271(a) preclude a fine in the circumstances you describe. Liquidated damages may be assessed under the terms of the Section 238(c) contract. We have reviewed the April 6, 1990, memorandum from G. Thomas Graber, Director, National Fines Office, and the September 14, 1988, memorandum from Margaret Philbin, General Attorney, INS, Miami District, and agree with their analyses. We have also reviewed the September 14, 1990, memorandum NFO280.10 from the Director of the National Fines Office to Assistant Chief Inspector Thomas Andreotta and find it unnecessary to address the concerns expressed therein under the facts of these cases.

III. DISCUSSION

Facts

The district director assessed fines against Air Jamaica under Section 271(a) of the INA for failure to present aliens for inspection at the time and place designated by an immigration officer. Air Jamaica is signatory to a contract under Section 238(c) of the INA, as amended, relating to the passage of TWOV's through the United States. The flight of the aliens in question arrived at 1:54 p.m. on January 19, 1988. Sometime between 7:20 and 7:40 p.m., Air Jamaica was served with Form I-259, Notice to Detain, Deport, Remove, Present, directing them to present the aliens in question for

inspection at 11:45 p.m. Air Jamaica did not present the aliens. The reason given by Air Jamaica for not presenting the aliens, who were allegedly classified as in transit without visa (TWOV) and whom the carrier had allegedly kept under guard in an in-transit lounge, is that it received the Form I-259 after the aliens had already departed the United States on their scheduled onward flight at 7:30 p.m. on January 19, 1988, a little more than five and a half hours after their arrival in the United States.

The Plain Language of Section 271(a) Excepts Carriers Signatory to Contracts Under Section 238 from Its Provisions

Section 271(a) of the INA states:

> It shall be the duty of every person, including the owners, masters, officers, and agents of vessels, aircraft, transportation lines, or international bridges or toll roads, other than transportation lines which may enter into a contract as provided in Section 238, bringing an alien to, or providing a means for an alien to come to, the United States (including an alien crewman whose case is not covered by Section 254(a)) to prevent the landing of such alien in the United States at a port of entry other than as designated by the Attorney General or at any time or place other than as designated by the immigration officers. Any such person, owner, master, officer, or agent who fails to comply with the foregoing requirements shall be liable to a penalty to be imposed by the Attorney General of $1,000 for each such violation … . [Emphasis supplied.]

By its terms, this section does not apply to transportation lines which enter into a contract under Section 238.[FN2] Air Jamaica had entered into a contract pursuant to Section 238(c), as amended, regarding TWOV's. The aliens involved in these cases were TWOV's. Therefore, Air Jamaica is not subject to a fine under Section 271(a) of the Act. Contracts Under Section 238 and INS Operations Instructions Provide for Liquidated Damages in Case of Violations by Signatory Carriers

At all relevant times, Air Jamaica (1968) Ltd. was signatory to an agreement on Form I-426 to bring aliens to the United States in immediate and continuous transit to destinations in foreign countries under Section 238(c) of the Act, as amended.

Paragraph 3 of the agreement provides "That the Commissioner reserves the right to require the line to present in-transit passengers on any flight at any time for primary inspection."

Paragraph 5 of the agreement provides

> That in-transit alien passengers defined in paragraph (1) above (except those prohibited by the Commissioner, see paragraph 6 below), whose ticketing or reticketing requires them to make connections through the use of the approved In-Transit Facilities, will not be required to be presented for immigration inspection, except upon specific request of an Immigration inspector, or if their flight connections cannot be completed within eight (8) hours or the next available flight.

In these cases, a specific request for presentation of the passengers was made by an immigration inspector.

Paragraph 7 of the agreement provides

> That the line will not, unless otherwise approved by the Commissioner, accept for passage through the United States any alien unless such alien meets the special prerequisites for admission as a transit without visa specified in Title 8, Code of Federal Regulations, Section 212.1(e) and Section 214.2(c), and the line shall, without expense to the government of the United States, remove to the foreign port from which the alien embarked to the United States any alien brought to the United States under this agreement whenever it has been determined by the appropriate Immigration authority that the alien is not eligible for passage through the United States in immediate and continuous transit.

Paragraph 11 of the agreement provides

That the line for each and every failure to transport any alien brought to the United States under this agreement in immediate and continuous transit through and out of the United States, unless such alien is legally processed for entry into the United States, shall pay to the United States of America, as liquidated damages and not as penalty, the sum of Five Hundred Dollars ($500.00), a lawful money of the United States.[FN3]

INS Operations Instructions (OI's) provide for the assessment of liquidated damages if the provisions of paragraph 7 of the agreement are violated. OI 238.1(a). However, the OI's also provide that, in general,[FN4] if the TWOV alien has departed voluntarily within eight hours after arrival or on the first available transportation thereafter, unless subsequent to apprehension by the Service, the carrier will be considered to have substantially complied with the agreement and will not be assessed liquidated damages. Id. Air Jamaica alleges that the TWOV aliens in question here departed on their planned onward flight within six hours of their arrival. The Notice of Intention to Fine under Section 271(a) Does Not Describe a Violation of Section 271(a)

We note that, in these cases, the notice of intention to fine states that the ground for the proposed fine is failure to present aliens for inspection at the time and place designated by the immigration officer. That is not the violation described in Section 271(a). The violation described in Section 271(a) is failure to prevent the landing of an alien at a port of entry other than as designated by the Attorney General or at any time or place other than as designated by an immigration officer. Failure of the alien to present himself at the designated time and place is prima facie evidence of landing, but may be rebutted. INA 271(b). If these aliens stayed in the in-transit lounge under guard until departure foreign as claimed, they are not considered to have "landed." Matter of Ching and Chen, 19 I&N Dec. 203 (BIA 1984).

The carrier alleges that the aliens departed to their onward destination within eight hours. We have not seen evidence, other than assertions, that the aliens in question in these cases actually departed.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-61

Legal Opinion: Status of 8 U.S.C. 1186a(c)(4) Under 5 U.S.C. 552(b)(3)

Robert Martinez, Assistant Commissioner, Information Systems

C0 2.12-P

August 6, 1991

I. ISSUE PRESENTED

Does Section 216A of the Immigration and Nationality Act (INA), 8 U.S.C. 1186a(c)(4), specifically exempt records from disclosure within the meaning of Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3)?

II. SUMMARY CONCLUSION

Section 216A of the INA, 8 U.S.C. 1186a(c)(4), specifically exempts records from disclosure within the meaning of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3), in that it "refers to particular types of matters to be withheld".

III. FACTS

On November 29, 1990, the Immigration Act of 1990, P.L. 101-649 (104 Stat. 4978, 5085) amended 8 U.S.C. 1186a(c)(4), Section 216A of the INA, to provide, inter alia, that "[t]he Attorney General shall, by regulation, establish measures to protect the confidentiality of information concerning any abused alien spouse or child, including information regarding the whereabouts of such spouse or child."

Paragraph (b)(3) of the FOIA, 5 U.S.C. 552, exempts records which are "specifically exempted from disclosure by statute (other than Section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the matter, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld" from the mandatory disclosure requirements of paragraph (a)(3). Statutes which meet the criteria of this exemption are often referred to as "Exemption 3" statutes.

IV. DISCUSSION

As quoted above, 5 U.S.C. 552(b)(3) contains only two clauses, but courts have universally held that it sets forth three alternative means by which a statute can exempt records from disclosure in such a manner as to justify their withholding in response to a request submitted under paragraph (a)(3) of the FOIA. E.g., Lam Lek Chong v. U.S. Drug Enforcement Admin., 929 F.2d 729, 734 (D.C. Cir. 1991). "Because subsection (B)'s conditions are phrased in the disjunctive, a statute need satisfy only one of the cited conditions to qualify under Exemption 3." Thus an Exemption 3 statute may either:

1. require that the records be withheld and leave no discretion with the agency;
2. leave some discretion but provide criteria for the exercise of that discretion; or
3. leave some discretion but specify the particular type(s) of records to be withheld.

Section 216A of the INA, 8 U.S.C. 1186a(c)(4), does direct the Attorney General to promulgate regulations protecting the confidentiality of the specified information concerning abused alien spouses or children, but nevertheless appears to leave some discretion concerning disclosure to persons other than the abuser. We need not decide this question, however, because of our conclusion that this statute qualifies under the second prong of paragraph (B); i.e., it clearly specifies the types of records to be withheld.

The Commissioner of INS, acting under authority delegated by the Attorney General, recently promulgated a regulation which implements this statutory mandate and strengthens our conclusion that the statute justifies withholding the records specified under exemption 3 of the FOIA.

As directed by statute, the information [concerning an abused spouse or child and] contained in the application and supporting documents shall not be released without a court order or the written consent of the applicant; or, in the case of a child, the written consent of the parent or legal guardian who filed the waiver application on the child's behalf. Information may be released only to the applicant, his or her authorized representative, an officer of the Department of Justice, or any federal or State law enforcement agency. Any information provided under this part may be used for the purposes of enforcement of the [Immigration and Nationality] Act or in any criminal proceeding.

8 C.F.R. 216.5(e)(3)(viii). 56 Fed.Reg. 22638 (May 16, 1991).

We note that the information would also be exempt from disclosure under Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6), as a clearly unwarranted invasion of personal privacy in that its release would constitute an invasion of personal privacy and would not reveal any information about the inner workings of a federal agency. U.S. Dept. of Justice v. Reporters Committee, 489 U.S. 749, 109 S.Ct. 1468 (1989).

V. CONCLUSION

Section 216A of the INA, 8 U.S.C. 1186a(c)(4), specifically exempts certain records from disclosure within the

meaning of Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3). Thus, the records identified in that statute need not be disclosed when requested under the FOIA.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-62

Soviet Crewmen Asylum Applicants

Luis del Rio, Director, Office of International Affairs and Outreach

August 14, 1991

This is in response to your request for a review of the asylum applications of five Soviet crewmen who abandoned their ships and applied for asylum in the United States.

ISSUES

I. Can the act of abandoning a Soviet ship by a Soviet crewman give rise to a well-founded fear of persecution on account of political opinion?

II. Can current country conditions in the Soviet Union lead a reasonable person who has departed without an exit visa to fear persecution?

ANALYSIS

I. Well-founded Fear of Persecution

In Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987), the BIA held that "an applicant has established 'a well-founded fear of persecution' if a reasonable person in his or her circumstances would fear persecution." See also Matter of A-G-, 19 I&N Dec. 502 (BIA 1987). The Supreme Court noted in INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1213 (1987) that one can have a well-founded fear of persecution even where there is substantially less than a fifty-fifty chance that such persecution will in fact occur. See also Matter of Mogharrabi, supra.

The fact that a country may punish its citizens for an illegal departure will not by itself be sufficient to support a valid asylum claim. Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983). However, a different conclusion would be reached where such punishment is disproportionately severe, or where the circumstances (including but not limited to severity of punishment) suggest that unauthorized departure is punished as an actual or imputed expression of political opinion. See The Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1979); Estrada-Posadas v. INS, 924 F.2d 916 (9th Cir. 1991); Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985); Desir v. Ilchert, 840 F2d. 723 (9th Cir. 1988).

To establish eligibility for asylum, the alien must prove a well-founded fear of persecution and such fear must be both subjectively and objectively reasonable. Del Valle v. INS, 901 F.2d 787 (1990). In the cases of these Soviet crewmen it would appear that both of these standards can be met.

An article of the Soviet Criminal Code makes leaving the Soviet Union without permission a crime punishable by up to twenty years' imprisonment and exile and even, in some cases, by death. although Soviet officials have promised a

new law easing travel restrictions, no such law has been forthcoming. Even citizens who request legal emigration documents from Soviet authorities must give up their housing and resident permits in order to obtain exit visas. Even though prospective emigrants will ordinarily not receive their exit visas for many months, and may not ever receive them, the severance of housing and related privileges is effective immediately. This can obviously cause great hardship. Applicants for emigration who cannot find long-term "temporary" lodging with family or friends may be forced to live in the streets or in rail or air terminals. Country Reports on Human Rights Practices for 1990 (1991) (U.S. Dept. of State) 1315–1316 (Country Reports).

The pattern that emerges is one not of random administrative inconvenience but of deliberate and systematic treatment of those who have expressed a desire to depart the Soviet Union permanently as "enemies of the state." The severe statutory punishment for unauthorized departure must be seen as part of this pattern. Under the law of the Soviet Union these five asylum applicants are not administrative offenders but political criminals.

While the facts stated above tend to prove the objective reasonableness of any fears these five crewmen might have about being forcibly returned to the Soviet Union, some of the crewmen were more articulate than others in describing the exact nature of their subjective fears. — stated that for his "defection" he would be imprisoned for at least fifteen years. — stated that as an applicant for asylum he would be placed in a psychiatric hospital. At the other extreme, —, although evidently fearful of forcible repatriation, could identify no specific consequences other than expulsion from his college and the unlikelihood of admission to a comparable institution. This may be because the interviewer questioned — only about his possible punishment as a homosexual, not as a defector.

The negative recommendations from the interviewer in three of these cases (those of the three seamen who defected in Baltimore) appear to be based solely on the failure of the three applicants to articulate specific and severe punishments for their attempted defections should they be forcibly repatriated. This is a misreading of the law. To deny an asylum claim of a person who is in fact afraid, and who may in fact be punished by imprisonment, exile, or death, on the ground that the person may subjectively believe the possible range of punishments to be somewhat less severe, would wrench the statutory requirement of a "well-founded fear" from its legislative purpose. The best reading of the somewhat sparse interview records is that all five seamen do regard themselves as "defectors" and that all fear forcible repatriation at least in part because of the consequences of their attempted defection. The subjective attitude of the applicants toward repatriation to the Soviet Union is best expressed by applicant —: "It is not a country but a prison."

II. Current Conditions in the Soviet Union

According to the Department of State's Country Reports, although the Soviet Union is a signatory to international documents which recognize the right to leave one's country and return, it continues to impose significant restrictions on emigration even to those wishing reunification with immediate relatives abroad. This restriction was recodified as recently as 1987. The Amnesty International Report 1991 relates the case of a man forcibly confined to a mental hospital, apparently for no other reason than that he had sought to emigrate and had renounced his Russian citizenship. Although appeal procedures are now available for involuntary confinement in mental institutions, Amnesty International has classified them as inadequate. Another report refers to the case of a man imprisoned since 1978 for trying to leave the country without official permission and possessing "anti-Soviet" literature, who was released in October 1990 after serving twelve years from his twenty-year sentence of imprisonment and internal exile. The current asylum regulations provide at 8 C.F.R. 208.13(b)(ii) that the government of the applicant's country of nationality or last habitual residence persecutes its nationals or residents if they leave the country without authorization or seek asylum in another country.

Although INS adjudicators can arguably take administrative notice that there has been a "lull" in the systematic mistreatment of political dissenters of all kinds within the Soviet Union, it is not at all clear that this relatively recent phenomenon should be regarded as vitiating what would otherwise be a well-founded fear of persecution. Not only the fairly recent documented instances of persecution of persons attempting to abjure their Soviet residence and/or citizenship, but

also the very recent "execution style" killing of Lithuanian border guards engaged in an analogous political activity, suggest that it is st ill possible for an attempted defector to have a well-founded fear that he will be regarded as an enemy of the Soviet state and punished accordingly. Again, it is important to remember that under the Cardoza-Fonseca standard an applicant need not prove that he will certainly, or even probably, suffer persecution; rather, it is sufficient that there be a reasonable probability of such persecution.

Finally, the most recent Congressional statement of national policy with respect to putative Soviet refugees underscores the importance of not adjudicating the claims of such persons in an historical vacuum. Pursuant to the implementation of P.L. 101-167, the "Lautenberg Amendment," INS has issued special guidance for the processing of refugee applicants and for the "enhanced sensitivity" which INS officers are to give when adjudicating refugee claims of nationals of the Soviet Union who are members of groups which have traditionally suffered persecution.

Although the Lautenberg Amendment is not applicable in the instant case, the Board of Immigration Appeals has noted that "[w]here the country at issue … has a history of persecuting people in circumstances similar to the … applicant's, careful consideration should be given to that fact in assessing applicant's claims." Matter of Mogharrabi, supra. The Service has adopted this position by regulation set forth at 8 C.F.R. 208.13(b)(ii).

Conclusion

We conclude, from the limited information available, that the continued restrictions on emigration from the Soviet Union, the deprivation subjected by law on persons requesting permission to emigrate, and the possibility of disproportionately severe punishment of a person who departs without an exit visa, are sufficient to establish that these applicants' fear of persecution is "well founded."

We note that the application of — suggests circumstances that might support a discretionary denial of asylum notwithstanding the applicant's reasonable fear that he might be persecuted on account of his defection. If, upon further investigation, the INS concludes that — is guilty of some or all of the transgressions he is accused of committing aboard ship, and that his defection was motivated primarily by a desire to escape punishment for these transgressions, denial of the application might be appropriate. If not, we recommend that the — application be granted.

We also recommend that the applications of —, —, —, and — be granted.

/s/ GROVER JOSEPH REES III

General Counsel

Genco Opinion 91-63

U.S. House of Representatives-Standards of Conduct

Gene McNary, Commissioner

CO-701

August 15, 1991

I. QUESTION PRESENTED

What are the applicable guidelines and statutes should a member of Congress exert extraordinary pressure on an ex-

ecutive branch agency, the Immigration and Naturalization Service (INS), to alter a decision affecting a Department of Justice program?

II. SUMMARY ANSWER

The Ethics Manual for the U.S. House of Representatives written by the Committee on Standards of Official Conduct of the House (Ethics Committee) contains a relevant chapter. The Ethics Reform Act of 1989, Public Law 101-194, as amended by Public Law 101-280 (1990 Technical Amendments) has some applicability to Congressional intervention. Further, there are several applicable sections in Title 18 of the United States Code.

III. DISCUSSION

The Ethics Committee is currently revising its standards of conduct to comply fully with the Ethics Reform Act of 1989. Even so, the old chapter entitled "Communications with Administrative Agencies" discusses the exercise of undue influence by members of Congress, as well as standards of conduct for congressional intervention. See Attachment l, pages 168–9. The undue influence section of this chapter notes that specific statutory proscriptions, ethical standards, and guidelines exist and that they narrow the "permissible scope of such activities, prevent abuses of office, and limit undue or improper influence or pressure upon administrative officials and the administrative process." This section of the manual also points out that federal courts have held agency action invalid if there is too much interference with an ongoing administrative proceeding.

In one case, charges in an indictment were sustained against two individuals, one a congressional aide, for such activity. See United States v. Sweig, 316 F.Supp. 1148 (D.C.N.Y., 1970). In that case, the indictment charged conspiracy to defraud the United States concerning the exertion of "dishonest, unlawful, impaired and undue pressure and influence" upon federal administrators. The indictment also charged the defendants with acceptance of fees from various individuals with matters pending before various federal departments and agencies to exert, on their behalf, the influence of the office of the Speaker of the House.

Recently, after ruling in the case of the "Keating Five" Senators, the Senate Ethics Committee advised Senators to rely on a House Ethics Committee advisory on constituent service issued in 1970. It states, in part:

> The overall public interest, naturally, is primary to any individual matter … .A member's responsibility in this area is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations. Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role. A member should make every effort to assure that representations made in his name by any staff employee conform to his instruction.

See "The Limits of Constituent Service", Birnbaum, Government
Executive (June 1991), pp. 30.

Mr. Ron Crump, an attorney with the Ethics Committee, indicated the Ethics Committee would like to be informed whenever there is a specific problem with one of their members. While the Ethics Committee strives to improve the standards of conduct in the House, there is no written equivalent to the standards of conduct governing federal employees located in the Code of Federal Regulations. In addition, the Ethics Committee has no particularly effective means to enforce these guidelines.

Mr. William Keefer, Deputy Section Chief, Public Integrity Section, Criminal Division, United States Department of Justice, indicated that depending on the specific facts of a given situation, criminal violations may be involved. Such violations might include: "Interference with commerce by threats or violence" (18 U.S.C 1951); "Obstruction of proceedings before departments, agencies and committees" (18 U.S.C 1505); and "Bribery" (18 U.S.C 201). See Attachment 2.

He offered to discuss specific facts of any Congressional contact on a confidential basis to determine whether an official referral of the matter from INS to the Public Integrity Section is warranted. Mr. Keefer stated that such incidents are more common than is generally known and that often, until underlying information is obtained explaining why a member is pressuring an executive agency, a full understanding of the activity remains unclear. Further, he stated the executive agency involved is not always in the best position to acquire such underlying information.

It is often difficult to determine at what point a member of Congress has gone beyond mere vigorous advocacy for a constituent. However, whenever such conduct involves threats if INS does not alter a decision affecting a Department of Justice program, that conduct should be investigated for possible ethical and/or criminal violations.

IV. RECOMMENDATION

Whenever you think actions of a particular member of Congress may constitute unethical and/or criminal conduct, you may wish to consider discussing the matter with Mr. Keefer, Deputy Section Chief, Public Integrity Section, on a confidential basis. Mr. Keefer's telephone number is 4-1420.

If you have any questions regarding this matter, please contact Fred Tournay or Deborah Meyers, Assistant General Counsels, at 4-8989 or 4-1260 respectively.

/s/ GROVER JOSEPH REES III
General Counsel
Attachments

Genco Opinion 91-64

Opinion: Discontinuance of INS Proficiency Test

Janet Charney, Assistant Commissioner, Office of Legalization

CO 1588-P

August 20, 1991

You have requested an opinion as to whether INS may discontinue offering the legalization proficiency test. Under 8 C.F.R. 245a.1(s)(5), the test is one means by which an applicant for Phase II, permanent lawful status under the legalization program, may show that he or she is "satisfactorily pursuing" a course of study in English and history and government, as required by Section 245A(b)(1)(D)(i)(II) of the Immigration and Nationality Act (Act), 8 U.S.C. 1255a(b)(1)(D)(i)(II).

We note that the test is not required by the Act and that INS has a reasonable explanation for ending the test. An agency is free to alter its past rulings and practices, but it may not do so without a reasoned explanation to the public. See Hatch v. Federal Energy Regulatory Commission, 654 F.2d 825, 834 (D.C. Cir. 1981), and cases cited therein. Accordingly, INS must amend 8 C.F.R. 245a.1(s)(5) before it may discontinue the proficiency test.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-65

Legal Opinion Your October 1, 1990, request for Legal Opinion: Employment Authorization Documents for American Indians born in Canada

John Schroeder, Assistant Commissioner, COADN

CO 274A-C

August 27, 1991

ATTN: Jackie Bednarz, Senior Immigration Examiner

In the subject memorandum, you request a Legal Opinion concerning the right of American Indians born in Canada to accept employment in the United States and the documents these aliens may present as evidence of employment authorization. Enclosed please find a copy of our March 14, 1989, Legal Opinion, which addresses these issues.

/s/ GROVER JOSEPH REES III
General Counsel
Enclosure

Genco Opinion 91-66

Legal Opinion Rescinding our 10/12/89 opinion: Whether — is excludable from the United States under INA Section 212(a)(22)

James A. Puleo, Associate Commissioner, COEXM

CO 315-P

September 19, 1991

ATTN: Y. Peggy Wong, COINS

In the subject opinion, we concluded that — (alien file # —) was subject to exclusion from the United States under Section 212(a)(22) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(a)(22) (1988). This opinion was based on the conclusion that Mr. — was ineligible for citizenship because he had applied for and received a permanent exemption from conscription due to his alienage. Congress has recently amended the law that governs this issue. Immigration Act of 1990 (1990 Act), Pub. L. No. 101-649, 404, 104 Stat. 4978, 5039 (1990). An alien ineligible for citizenship remains subject to exclusion. INA 212(a)(8)(A), 8 U.S.C. 1182(a)(8)(A). The law now provides, however, that

> [a]n alien shall not be ineligible for citizenship under this section or otherwise because of an exemption from training or service in the Armed Forces of the United States pursuant to the exercise of rights under a treaty, if before the time of the exercise of such rights the alien served in the Armed Forces of a foreign country of which the alien was a

national.

Id. 315(c), 8 U.S.C. 1426(c), as amended by 1990 Act, 404, 104 Stat. at 5039. Mr. —, a citizen of Switzerland, served in the Swiss Armed Forces before immigrating to the United States and seeking exemption from conscription. He is, therefore, entitled to the benefit of Section 315(c) and is no longer subject to exclusion. Please update Service records accordingly. It would also be appropriate to advise —, who is Mr. —'s counsel.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-67

Legal Opinion Rescinding our 10/12/89 opinion: Whether is excludable from the United States under INA Section 212(a)(22)

James A. Puleo, Associate Commissioner, COEXM

CO 315-P

September 19, 1991

ATTN: Y. Peggy Wong, COINS

In the subject opinion, we concluded that — (alien file —) was subject to exclusion from the United States under Section 212(a)(22) (1988). This opinion was based on the conclusion that Mr. — was ineligible for citizenship because he had applied for and received a permanent exemption from conscription due to his alienage. Congress has recently amended the las that governs this issue. Immigration Act of 1990 (1990 Act), Pub. L. No. 101-649, 404, 104 Stat. 4978, 5039 (1990. An alien ineligible for citizenship remains subject to exclusion. INA 212(a)(8)(A), 8 U.S.C. 1182(a)(8)(A). The law now provides, however, that [a]n alien shall not be ineligible for citizenship under this section or otherwise because of an exemption from training or service in the Armed Forces of the United States pursuant to the exercise of rights under a treaty, if before the time of the exercise of such rights the alien served in the Armed Forces of a foreign country of which the alien wa a national.

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/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-68

Legal Opinion: Charging Application Fees for Border Crossing Cards

Michael D. Cronin, Assistant Commissioner, Office of Inspection

CO 235-C

September 23, 1991

I. QUESTIONS

1. May the United States charge Mexican citizens an application fee when they apply for the issuance of a Nonimmigrant Mexican Border Crossing Card, Form I-586?

2. Would a different result be reached if the United States were to charge Mexican citizens a fee for renewing an expired Nonimmigrant Mexican Border Crossing Card, Form I-586, if the United States were to place an expiration date on these cards?

3. May the United States charge Mexican citizens a fee for replacing a valid Nonimmigrant Mexican Border Crossing Card, Form I-586?

II. SUMMARY ANSWERS

1. No. The existing Agreement on Passport Visas (Treaty) between the United States and Mexico bars the United States from charging Mexican citizens a fee when they apply for the issuance of a border crossing card. To charge such a fee requires that an amendment to the Treaty be negotiated by the Secretary of State.

2. No. The existing Treaty between the United States and Mexico would also bar the United States from charging Mexican citizens a fee for renewing an expired Nonimmigrant Mexican Border Crossing Card, Form I-586.

3. It is not clear whether the Treaty would bar the United States from charging a fee for the replacement of a lost, stolen, or mutilated Nonimmigrant Mexican Border Crossing Card, Form I-586. The Immigration and Naturalization Service (INS) should, however, coordinate with the Department of State prior to instituting such fees.

III. BACKGROUND

The Treaty, October 28-November 12, 1953, United States-Mexico, 5 U.S.T. 174; T.I.A.S. No. 2912, is the controlling authority on the issuance by the United States of nonimmigrant visas and border crossing cards to Mexican citizens. Article 12 of the Treaty states: "To Mexican citizens who reside in or near the Border Area and who seek to cross the border habitually or periodically, there will be issued nonresident aliens' border-crossing identification cards which may be used for multiple applications for admission during the validity of such cards." (Emphasis added). Thus, the right of the United States to charge fees for the issuance of border-crossing identification cards is governed by other Treaty provisions amplifying Article 12.

This Treaty is comprised of three components: 1) the articles of the agreement proposed by the United States following the negotiations, 2) the acceptance of the agreement that includes interpretations of the articles by the Mexican government, and 3) diplomatic notes exchanged by the two governments to implement the agreement. In this Treaty, the specific waiver of charges for the border crossing cards is set forth in an exchange of diplomatic notes between the two governments. Such an exchange of diplomatic notes in this context becomes a provision of the treaty. Specifically, a diplomatic note dated November 10, 1953 (quoted in its entirety), reads as follows:

Translation

MINISTRY OF FOREIGN RELATIONS UNITED MEXICAN STATES MEXICO 621729 MEXICO, D. F., November 10, 1953 EXCELLENCY: With further reference to the contents of my note No. 621728 dated today, I am happy to inform Your Excellency that, in conformity with legal provisions in force, my Government has established the following immigration fees, according to the various categories of nonimmigrants specified in the aforesaid note:

Article 1	Gratis
Article 2	Gratis
Article 3	
Paragraph 1	$26.00
Paragraph 2	Gratis
Article 4	
Paragraph 1	$43.25
Paragraph 2	Gratis
Article 5	$26.00
Article 6	$43.25
Article 7	$26.00
Article 8	Gratis
Article 9	Gratis
Article 10	Gratis
Article 11	Gratis
Article 12	Gratis
Article 13	$360.00
Article 14	Gratis
Article 15	Gratis

On transmitting the foregoing information to Your Excellency, I should appreciate it if you would inform me of the fees for the issuance of nonimmigrant visas which the Government of the United States of America has decided to establish in reciprocity.

I take pleasure in renewing to Your Excellency the assurances of my highest and most distinguished consideration. L. P. N.

His Excellency Francis White, Ambassador of the United States of America, Mexico, D. F.

The American Ambassador to the Mexican Minister for Foreign Relations

See 5 U.S.T. at 190–91. On November 12, 1953, the Mexican government responded with diplomatic note No. 472, in which it concurred with the government of the United States, that, with respect to Article 12 of the agreement, there should be no charge for border crossing cards. Thus, the Treaty does not permit the United States to charge for the issuance of any documents issued pursuant to Article 12, and equally clearly (as explained above), Article 12 is the governing authority for our issuance of border crossing cards.

This exchange of diplomatic notes regarding fees to be charged or waived for nonimmigrants was based on the Immigration and Nationality Act of 1952 (INA), which did not prescribe fees for border crossing cards. Diplomatic note No. 472 specifically references Section 281 of the INA as the authority for the fees for the various categories of nonimmigrants covered by this Treaty, including those Mexican citizens who would need border crossing cards. See 5 U.S.T. at 191. Section 281 of the INA, 8 U.S.C. 1351, provides that "the Secretary of State shall prescribe fees for the issuance of nonimmigrant visas corresponding as nearly as practicable to the fees charged nationals of the United States by foreign

governments." The United States government has implemented Section 281 by entering into various bilateral agreements with foreign countries reciprocally waiving or reducing passport fees for non-immigrants. The 1953 Treaty with Mexico is one of these agreements.

Treaties may be cancelled by mutual accord, superseded by legislation, or amended. This Treaty was amended by an exchange of diplomatic notes on May 29, 1974, 25 U.S.T. 1172; T.I.A.S. No. 7847. However, the 1974 amendment did not alter Article 12 of the Treaty and thus has no effect on this discussion. Moreover, there is no legislation voiding Article 12 of this Treaty, and the countries have not cancelled it by mutual accord.

IV. ANALYSIS

General. The Immigration Act of 1990 (IMMACT 90) did not alter Section 281 of the INA, codified as 8 U.S.C. 1351. The section still states that fees for nonimmigrant visas shall be prescribed by the Secretary of State in amounts corresponding to the total of all visa, entry, residence, or other similar fees, taxes, or charges assessed against United States nationals by the foreign countries of which such nonimmigrants are nationals or stateless residents. Although Section 281 does not specifically address border crossing cards, it appears that Congress intended for these cards to be included under the phrase "all visa, entry, residence, or other similar fees, taxes, or charges." In an explanatory note in the U.S. Code Annotated, this Treaty is listed as one of the bilateral agreements the United States has entered with foreign countries implementing Section 281. Also see, Department of State memorandum of March 26, 1986. (Attachment A).

The term "border crossing identification card" was first used in The Alien Registration Act of 1940, June 28, 1940, 54 Stat. 670, now codified as 8 U.S.C. 1302, but it was The Immigration and Nationality Act of 1952, June 27, 1952, 66 Stat. 224, now codified as 8 U.S.C. 1101, which first defined it. See H.R. Rep. No. 1365, 82nd Cong., 2nd Sess. (1952), reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1683. This Act defined the term as "a document of identity bearing that designation issued to an alien who is lawfully admitted for permanent residence, or to an alien who is a resident in foreign contiguous territory, by a consular officer or an immigration officer for the purpose of crossing over the borders between the United States and foreign contiguous territory in accordance with such conditions for its issuance and use as may be prescribed by regulations." 8 U.S.C. 1101(a)(6). The border crossing cards issued pursuant to the Treaty do nothing more than allow holders to enter the United States on a regular basis for a period not to exceed seventy-two hours, to visit, within twenty-five miles of the border; i.e., they confer no special privileges such as the right to enter through an express lane. 8 C.F.R. 212.6(a)(2), 235.1(f)(1)(iii). These cards are valid until revoked or voided. 8 C.F.R. 212.6(c).

Neither Mexico nor the United States currently imposes charges for border crossing cards. In fact, Mexico does not even issue such cards for routine crossings. It did, however, reserve that right in 1953 by diplomatic note, No. 621728, which states that the requirement of such cards for nationals of the United States would be without charge on the basis of reciprocity. See 5 U.S.T. at 186.

1. A duly executed Treaty has the force and effect of law. See 2 Sutherland Statutory Construction, Section 36.07, at 70 (4th ed. 1985). Article 12 of the Treaty, as amplified by the diplomatic notes quoted above, expressly prohibits the charging of fees for the issuance of Nonimmigrant Mexican Border Crossing Cards. Accordingly, until and unless the United States and Mexican governments amend the Treaty to permit the charging of such fees, any attempt to do so by either government would be a clear violation of the Treaty.

2. Currently, there is no expiration date on such cards. Once issued, the cards remain valid unless revoked, lost, stolen or mutilated. If the United States were to begin issuing border crossing cards with an expiration date, charging a fee for the renewal of Nonimmigrant Mexican Border Crossing Cards, for the reasons explained above, would be prohibited by the Treaty.

If the Administration determines that it wishes to charge Mexican citizens a fee for issuing or renewing border crossing cards, it should instruct the Secretary of State to seek to negotiate the necessary amendment to the 1953 Treaty. It ap-

pears probable, however, that Mexico would institute a similar card system and demand the right to charge similar fees of nonimmigrant United States citizens wishing to enter Mexico.

3. The Treaty is silent about whether either country can charge a fee for replacing lost, stolen, or mutilated border crossing cards. It is arguable, therefore, that it does not prohibit the charging of fees in these circumstances. As noted above, reciprocity regarding fees is a consistent theme throughout this Treaty. Thus, it is conceivable that Mexico might consider this action to be a violation of the Treaty. We have had informal discussions with the Department of State on this issue, but they have declined to render a formal opinion without an official inquiry from INS.

If the Treaty does not bar the imposition of such fees, INS (as does every other federal agency) has statutory authority to assess a fee for the value of a service or thing, not to exceed the cost thereof, which it provides for the benefit of any person. 31 U.S.C. 9701. See Electronic Industries Assn. v. Federal Communications Commission, 554 F.2d 1109, 1114 (D.C. Cir. 1976); and National Cable Television Assn., Inc. v. United States, 415 U.S. 336, 342–3 (1974). In view of the potential effects on foreign relations, and the fact that the Secretary of State possesses the statutory authority to negotiate with public ministers from foreign states, we urge that you obtain concurrence from the Department of State prior to initiating replacement fees. 22 U.S.C. 2656. If INS secures this concurrence, it would then have to promulgate regulations providing for the fees.

V. CONCLUSION

The United States may not charge Mexican citizens a fee either for issuing a border crossing card or replacing an expired one under the existing Treaty. Thus, the United States and Mexican governments would have to agree to an amendment to the Treaty before either country could charge such fees. Negotiating amendments to treaties is the responsibility of the Department of State. While the Treaty does not specifically preclude charging a fee for replacing a lost, stolen, or mutilated border crossing card, Mexico might still view this action as a violation of the Treaty. We therefore recommend obtaining formal clearance from the Department of State prior to instituting a replacement fee.

Please contact Deborah Meyers, Assistant General Counsel, at 514-1260 if you have any questions regarding this matter.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-69

Petition for naturalization of —, Pet. No. (—)

Charles A. Del Bene, Assistant District Counsel, Los Angeles

CO 316-C

September 30, 1991

QUESTIONS

You have asked, in connection with the subject case, whether a petitioner for naturalization can establish good moral character if he has been pardoned for his foreign conviction for murder. You have also asked whether there may be any

other basis for granting naturalization in this case.

SUMMARY CONCLUSIONS

It is our opinion that a foreign pardon cannot erase the bar to the establishment of good moral character by an alien who was convicted for murder.[FN1] In this case, however, it appears that the appeals court overturned the lower court conviction for murder and entered an order convicting the alien for the lesser offense of homicide. This appears to be the equivalent of voluntary manslaughter. If it is, the bar to establishment of good moral character due to a murder conviction is not applicable in this case.

DISCUSSION

Relevant Facts

The subject alien is a native and citizen of the Republic of the Philippines. According to documents in the record of the alien's immigrant visa application, on March 31, 1949, he was convicted in the Court of First Instance, Ilocos Norte, Second Judicial District, Republic of the Philippines, of murder, qualified by treachery. He appealed that decision, and on April 30, 1952, the Court of Appeals, Baguio, Republic of the Philippines, found that "[t]he trial court committed error in convicting the appellant for the crime of murder qualified by treachery. … The crime committed by the appellant should … be qualified as that of homicide only." He was imprisoned for this crime from November 13, 1953, to January 1, 1961, when he was granted a conditional pardon by President Carlos P. Garcia. On September 11, 1967, he was granted a full and unconditional pardon for a conviction "by the Court of First Instance of Ilocos Norte and the Court of Appeals of murder"[FN2] and restored to full civil and political rights by President Ferdinand Marcos.

On June 17, 1983, the Acting Officer in Charge, Manila, pursuant to Section 212(h) of the Act, granted the subject a waiver of excludability under Section 212(a)(9).[FN3]

Subsequently, on February 4, 1984, the subject was admitted to the United States as a lawful permanent resident on the basis of a visa petition filed by his United States citizen son.[FN4]

A Petitioner For Naturalization Must Establish That He Has Been A Person Of Good Moral Character For The Statutory Period

A petitioner for naturalization must establish that he has been a person of good moral character for the five years immediately preceding his application for naturalization and thereafter until he takes the oath of citizenship. Immigration and Nationality Act (INA) 316.

Good Moral Character Cannot Be Shown By One Who At Any Time Has Been Convicted Of Murder

An alien who has at any time been convicted of murder cannot satisfy the good moral character requirement of Section 316. INA 101(f)(8). In contrast, other bars to good moral character are generally (INA 101(f)(1), (4), and (6)) or specifically (101(f)(3), (5)[FN5], and (7)) limited to acts committed, convictions, or confinement during the period for which good moral character must be established.

If This Alien Was Convicted, Not For Murder, But For The Equivalent of Manslaughter, He Is Not Barred From Naturalization By Section 101(f)(8)

The applicable provisions of the Penal Code of the Philippines are attached. Generally, United States standards govern in determining whether an offense committed in a foreign country is a crime in the United States, Matter of McNaughton, 16 I&N Dec. 569 (BIA 1978), citing 37 Op. Att'y Gen. 293 (1933); what an equivalent crime in the United States is, Matter of Marino, 15 I&N Dec. 284 (BIA 1975); whether it is a felony or a misdemeanor, Matter of De La Nues, 18 I&N Dec. 140, 143 (BIA 1981); whether it constitutes an act of juvenile delinquency, id.; and whether it is a crime involving moral turpitude, Matter of McNaughton, supra, and cases cited therein.

It is our opinion that in this case it is similarly appropriate to compare the crimes of murder and homicide under the Penal Code of the Philippines with United States law. Sections 1111 and 1112 of Title 18 of the United States Code (copy attached) define the federal crimes of murder and manslaughter, respectively. It appears to us that the Filipino crime of murder fits within the United States definition of murder, and that the Filipino crime of homicide is comparable to the United States crime of voluntary manslaughter. If the naturalization examiner is satisfied that this alien was convicted of homicide in the Philippines, he may nevertheless be able to establish good moral character for purposes of Section 316 of the Act.

A Foreign Pardon Does Not Nullify A Conviction For Purposes Of Qualifying For Naturalization

Congress has provided a specific statutory waiver of deportability if, subsequent to conviction, the alien has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States. INA 241(a)(2)(B)(iv).[FN6] It has long been held that foreign pardons are ineffective to prevent exclusion and deportation, Matter of B-, 7 I&N Dec. 166 (BIA 1956); Matter of G-, 5 I&N Dec. 129 (BIA 1953); Matter of F- y G-, 4 I&N Dec. 717 (BIA 1952). There is no provision for a foreign pardon to be the basis for a waiver of ineligibility for naturalization. Therefore, if the examiner concludes that the conviction in this case was for murder, it is our opinion that the foreign pardon is ineffective to nullify the conviction for purposes of naturalization.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-70

Legal Opinion: Your Memorandum of August 27,1991, re the Funding of Investigators Exclusively for Adjudications Cases

Michael T. Lempres, Executive Associate Commissioner, Operations

CO 762, 1192

October 11, 1991

I. QUESTION PRESENTED

Can the Examinations Fee Account be used to fund a specialized group of investigators who will be hired and authorized to work adjudications cases only?

II. SUMMARY CONCLUSION

Yes. Examinations Fee Account funds are available only for those expenses that are reasonably related to and necessary for the accomplishment of adjudication and naturalization services. It is our opinion that the specialized group of investigators may be funded out of the account, so long as they are hired and authorized to work adjudication cases only.

III. ANALYSIS

Under established principles of fiscal law, the authority both to obligate and commit funds derives from an appropriation act enacted by Congress. Appropriations are available only for the purposes specified by Congress in the appropri-

ation act. 31 U.S.C. 1301(a). Typically, Congress appropriates funds by making them available out of the Treasury. However, in the instant case, Congress appropriated funds by establishing a reimbursement account in the Treasury into which fees collected for services are deposited. These funds remain available for use by the agency in providing immigration adjudication and naturalization services.

Interpretation of appropriation acts, like that of other statutes, has as its chief goal determination of legislative intent and, following the usual rules of statutory construction, the language of the act will be the primary determinant. Comp. Gen. Dec. B-200766 (Sept. 10, 1981); 42 Comp. Gen. 226 (1962); 26 Comp. Gen. 545 (1945). The legislative history may be considered, but where the language of the statute is clear on its face, the legislative history shall not operate either to restrict or expand an otherwise clear intent. Morton v. Ruiz, 415 U.S. 199 (1974). To determine the purposes for which appropriations are available, we must focus on whether an expense is "reasonably related to and necessary for the accomplishment of the stated purpose. To the extent that purpose is narrowly stated and specific, what is related and necessary to it will be more restrictively interpreted." R. Nash and J. Cibinic, I Federal Procurement Law 663 n.1 (1977).

The Examinations Fee Account was established in the Department of Justice Appropriation Act for 1989 (Appropriation Act), P.L. 100-459, 102 Stat. 2203 (1989). Section 209(a) of that act amended 8 U.S.C. 1356. It states, in pertinent part, that:

> (M) Notwithstanding any other provisions of law, all adjudication fees as are designated by the Attorney General in regulations shall be deposited into a separate account entitled 'Immigration Examinations Fee Account' in the Treasury of the United States, whether collected directly by the Attorney General or through clerks of courts: Provided, however, That all fees received by the Attorney General from applicants residing in the Virgin Islands of the United States, and in Guam, under this subsection shall be paid over to the treasury of the Virgin Islands and to the treasury of Guam.
>
> (N) All deposits into the 'Immigration Examinations Fee Account' in excess of $50,000,000 shall remain available until expended to the Attorney General to reimburse any appropriation the amount paid out of such appropriation for expenses in providing immigration adjudication and naturalization services and the collection, safeguarding and accounting for fees deposited in and funds reimbursed from the 'Immigration Examinations Fee Account'. At least annually, deposits in the amount of $50,000,000 shall be transferred from the Immigration Examinations Fee Account' to the General Fund of the Treasury of the United States. (emphasis added).

The language of the statute is clear and unambiguous. The fund is available for "expenses in providing adjudication and naturalization services … ."

Moreover, the conference report which accompanied the Appropriation Act supports this interpretation: "The conference expects that the funds generated by this Account shall not be used for any purpose other than enhancing naturalization and adjudications programs." H.R. Conf. Rep. 100-979, 100th Cong., 2d Sess. (1988). Adjudications activities include processing applications for permanent resident status, petitions for relatives, worker's applications, reentry permits, refugee travel documents, and requests for extensions of temporary stay.

It is our understanding that the investigators will be involved in low-level, single-issue fraud case work as referred by the adjudications program. The investigators' purpose will be to uncover any fraud involved in applications for benefits handled by the adjudications program. Specifically, they will be doing field fact-finding to verify facts alleged in the applications for benefits. They will check such items as original documents and computer data bases to verify facts. They will also visit alleged addresses and question neighbors and coworkers to see if the benefit seeker actually resides there, works there, is married, has children, etc.

A pilot study conducted by adjudications personnel showed that such investigations substantially increased detection of fraud. Thus, this work is reasonably related to and necessary for the provision of adjudication services, and would clearly enhance proper implementation of the adjudications program. The Immigration and Naturalization Service may

therefore fund these positions from the Examinations Fee Account, provided that the caseload of the persons paid from this account consists exclusively of cases referred by adjudications personnel.

IV. CONCLUSION

It is our opinion that the functions of a specialized group of investigators, hired and authorized to work adjudications cases only, are reasonably related to and necessary for the provision of adjudication services. Such a specialized and dedicated group would clearly enhance the adjudications program, in the manner Congress intended when it discussed the use of account funds. Accordingly, the account may be used to fund this specialized group of investigators.

For further information, please contact Assistant General Counsel Robert Egan at 514-1260.

/s/ GROVER JOSEPH REES III

General Counsel

Genco Opinion 91-71

Telephonic Verification of Alien Documentation

Jessee F. Tabor, Chief Patrol Agent, New Orleans Sector

CO 274A

October 15, 1991

This office is in receipt of your memo dated September 4, 1991, relating to the above-referenced subject. Your memo asks for clarification of the Service's obligations in telephonically verifying to an employer the authenticity of an employee's alien registration document.

I. ISSUE

Are INS officers prohibited from "verifying or denying on the phone the authenticity of an alien registration document" to an employer, and if so, what is the legal basis?

II. SUMMARY CONCLUSION

INS officers are prohibited from responding to inquiries from employers for employment authorization verification without written authorization from the alien, until a telephone verification system that complies with the requirements of Section 274A(d) of the Immigration and Nationality Act (the Act) is established. This restriction was imposed by a stipulated compromise that INS entered into in 1988.

III. LEGAL ANALYSIS

As your memo correctly notes, the Act, as amended by the Immigration Reform and Control Act of 1986, contains provisions relating to a telephonic employment verification system. Specifically, Section 274A(d) of the Act calls for the President to monitor the employment verification system and to implement changes to establish a secure system. A change such as the implementation of a telephone verification system is defined as a "major change," Section

274A(d)(3)(D)(ii) of the Act, thereby requiring written notification to Congress at least two years before the date of implementation. Section 274A(d)(3)(A)(iii) of the Act. The President is also authorized to conduct demonstration projects of proposed changes to the employment verification system. Section 274A(d)(4)(A) of the Act. The Service is currently seeking an Executive Order delegating the President's authority to conduct demonstration projects to the Attorney General, and ultimately to the Commissioner.

On February 17, 1988, the Service entered into a stipulated compromise in a case entitled Salinas-Pena v. United States Immigration and Naturalization Service, Case No. CV86-1033DA (D. Or. 1988)(copy attached). In that agreement, the Service agreed to the following:

1. That INS would not implement an employment verification system except as provided in Section 274A(d) of the Act;
2. That INS would modify the Immigration Officer's Field Manual for Employer Sanctions (Form M-278) to reflect the statutory prohibition against adopting "any system of response to employer inquiries about the legal status of any alien or about the alien's authorization for employment" without following the mandates of Section 274A(d) of the Act and "directing Service employees not to respond to inquiries from employers for employment authorization verification without written authorization from the alien;" and
3. That INS would implement the agreement nationwide.

A copy of the revised pages to the Field Manual and an explanatory wire dated January 26, 1988, are attached for your review.

Therefore, although providing telephonic assistance to employers relating to verification of employment eligibility might enhance our ability to intercept counterfeit documents and promote good-will, the Service is prohibited from routine status verification without the written permission of the alien. Note, however, that the Service may continue to provide training to employers through the Employer and Labor Relations division, and to respond, in specific cases, to a request by an employer to examine a specific document.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-72

CO 274A

October 17, 1991Mr. —Attorney at LawLanePowellSpears & Lubersky520 S.W. Yamhill Street, Suite 800 PortlandOregon 97204-1383Dear Mr. —:This letter is in response to your request for a Legal Opinion concerning an employer's obligation to reverify employment eligibility when a former employee is rehired.

The Immigration and Nationality Act, as amended (the Act), makes it unlawful for a person or other entity to hire for employment (and to recruit or refer for a fee in the case of agricultural associations, agricultural employers, and farm labor contractors) in the United States an individual without complying with the employment eligibility verification requirements. Section 274A(a)(1)(B) and (b) of the Act; 8 U.S.C. 1324a(a)(1)(B) and (b).

Many of the issues which you raise in your letter are addressed in the revised employer sanctions regulations, which were recently published in the Federal Register on August 23, 1991. These regulations become effective on November 21, 1991. This opinion is based upon these new regulations and might be altered if one or more of the underlying facts were modified or omitted.

Your first question is whether the factors listed in the regulations at 8 C.F.R. 274a.2(b)(viii)(A) are to be "considered on balance," or whether a "negative response to any one of them mean[s] that the individual is not a 'continuing employee'"? The pertinent sections in the new regulations have been reorganized and can be found at 8 C.F.R. 274a.2(b)(1)(viii)(A) and (B). If an individual is continuing in his or her employment and has a reasonable expectation of

employment at all times, the return to work by that individual will not constitute a new hire. The situations described in paragraph (b)(1)(viii)(A) define when employment is continuing. These eight situations are an exclusive list. If the employee cannot be categorized in one of these eight situations, his or her return to work will constitute a new hire. If the employee fits into any one of the eight continuing employment situations, the employer must then determine whether that employee had a reasonable expectation of employment at all times. The factors listed in paragraph (b)(1)(viii)(B) assist in this determination. However, the list of factors in paragraph (B) is illustrative only. Only if the person is involved in a continuing employment situation is the determination relating to the reasonable expectation of employment made. If the person is continuing in his or her employment, i.e., he or she fits into one of the eight continuing employment situations and has a reasonable expectation of employment at all times, then re-employment of that individual will not constitute a new hire.

Your second and third questions concern what is meant by "seasonal employment" and whether an employer should distinguish between "seasonable" agricultural employees and other types of "seasonal workers." Your reference to the term "seasonable" was presumably in error since this is not a term which is found in the regulations. Although the term "seasonal employment" is a term of art, it is not defined in the regulations but could include any type of seasonal work, e.g., agricultural labor, life-guarding, and construction work. Based on the facts that you presented in your letter, it appears that these employees may fit into any of three continuing employment situations described in paragraph (A): individuals who are temporarily laid off for lack of work (paragraph (A)(3)); individuals who transfer from one distinct unit of an employer to another distinct unit of the same employer (paragraph (A)(6)); and/or individuals who are engaged in seasonal employment (paragraph (A)(8)). However, in order for an employee to be continuing in his or her employment, the employer must also establish that the employee has a reasonable expectation of employment at all times in light of the factors listed in paragraph (B). If the employer can satisfy both prongs of this analysis, then these employees would be continuing in their employment and re-employment of those persons would not constitute new hire situations.

Your final question is whether an employer may satisfy its obligation to reverify an employee's employment eligibility by checking the data contained on a previously filed Form I-9 and not completing a new Form I-9 each time an employee is rehired unless there are changes. The new regulations speak directly to this issue at 8 C.F.R. 274a.2(c)(1)(i). When an employer seeks to rehire a former employee within three years of the initial execution of the Form I-9, the new regulations permit the employer to update or reverify the original Form I-9 in lieu of completing a new Form I-9. If the employer's review of an employee's Form I-9 reveals that the employee is still eligible to work on the same basis or by the same grant of work authorization as when the Form I-9 was originally completed, the employer should line through the date in the certification block at the bottom of Section 2 of the Form I-9, put in the date of the rehire, and initial the change. This process is referred to as "updating." However, if at the time of rehire the employer's review of an employee's Form I-9 reveals that the employee is no longer eligible to work on the same basis or by the same grant of work authorization as when the Form I-9 was originally completed, the employer must reverify the employee's eligibility to work by complying with the employment verification requirements found at 8 C.F.R. 274a.2(b)(1)(vii). This process is referred to as "reverification." We anticipate that appropriate space will appear on the revised Form I-9 for such updating and reverification purposes.

We hope this opinion will assist you in providing legal advice to your client./s/ GROVER JOSEPH REES IIIGeneral Counsel

Genco Opinion 91-73

SUPERSEDING Legal Opinion: Modification of Social Security Card to Require Presentation With INS-Issued Document

Edward J. Lynch, Director Office of Strategic Planning

CO 274A, 274B

October 17, 1991

I. ISSUE

Can the Social Security Administration (SSA) include a legend on Social Security Account Number cards (SSAN cards) issued to aliens with temporary work authorization stating that the SSAN card is valid for purposes of employment verification only if it is presented with a work authorization document issued by the Immigration and Naturalization Service (INS)?

II. SUMMARY CONCLUSION

Such a legend is impermissible without Congressional review since it constitutes a "major change" as defined in Section 274A(d)(3)(D)(iii) of the Immigration and Nationality Act (the Act). If Congressional review is obtained, then such a legend would be permissible and would not violate the anti-discrimination provisions contained at Section 274B of the Act.

III. LEGAL ANALYSIS

This office has on two previous occasions addressed the issue of the propriety of placing a legend on SSAN cards issued to aliens with temporary work authorization.[FN1] The legend would state that in order to suffice for purposes of the employment verification system established under Section 274A(b) of the Act, the SSAN card would have to be presented to an employer in conjunction with an INS-issued work authorization document. The stated purpose of this legend would be to close the current loophole by which aliens obtain unrestricted SSAN cards and then have acceptable, unlimited documentation permitting them to obtain employment even after the period of their work authorization granted by INS has expired.

The inclusion of a legend on the SSAN card triggers certain Congressional review provisions of the Act. When the employer sanctions provisions were added to the Act by the passage of the Immigration Reform and Control Act of 1986 (IRCA), limitations on modifications to the employment verification system were created. Specifically, Section 274A(d)(3)(D) of the Act defines "any change in any card used for accounting purposes under the Social Security Act" as a "major" change, thereby implicating one year prior notification to Congress of the proposed change, Section 274A(d)(3)(A)(ii) of the Act, and Congressional review. Section 274A(d)(3)(C) of the Act.

To the extent that there is ambiguity about whether the proposed legend would in fact constitute a "major" change, resort to legislative history is instructive:

> The conference substitute requires the President to provide one year's notice to Congress before instituting any change in the social security card (including a requirement that current social security cards be universally used for employment authorization), and requires Congress to specifically appropriate funds for any such change.

H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 90 (1986)(emphasis supplied). Although the legend under consideration is not directly analogous to a requirement that the SSAN card be "universally used for employment authorization," the legend does constitute a change from the present SSAN card so as to qualify as a "major" change under the Act.

Therefore, the one year notification provisions to Congress would be effective.

Section 535 of IMMACT 90, Section 274B(a)(6) of the Act, states as follows:

> For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of Section 274A(b) [the employment verification system], for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

Section 274A(b)(1)(C)(i) of the Act provides that a "social security account number card (other than a card which specifies on the face that the issuance of the card does not authorize employment in the United States)" is an acceptable document to evidence employment eligibility. If Congressional approval is obtained, an SSAN card with the proposed legend requiring presentation along with an INS work authorization document would constitute "a card which specifies on the face that the issuance of the card does not authorize employment in the United States." Therefore, the proposed legend does not violate this anti-discrimination provision since an SSAN card with the proposed legend would not be, by itself, an acceptable document for purposes of the employment verification system set forth at Section 274A(b) of the Act.

If you need further assistance on this matter, please contact Michael C. McGoings, Associate General Counsel, at 514-1266.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-74

Legal Opinion: Eligibility under the Federal Law Enforcement Pay Reform Act of 1990

Chris Sale, Executive Associate Commissioner Management

CO 1297-P

November 8, 1991

I. ISSUE PRESENTED

Do the benefits and incentives established by the Federal Law Enforcement Pay Reform Act of 1990, P.L. 101-529, 529, 104 Stat. 1465 et seq.[FN2] (FLEPRA) apply to all positions which the Immigration and Naturalization Service (INS) has classified as law enforcement positions?

II. SUMMARY CONCLUSION

No. The benefits and incentives of FLEPRA are not associated with any particular position or type of position. In order to be eligible for FLEPRA's benefits and incentives an employee must meet the definition of "law enforcement officer" contained in either 5 U.S.C. 8331(20) or 8401(17).

III. BACKGROUND

FLEPRA establishes monetary and other incentives for federal law enforcement officers. Certain INS employees hold positions classified as law enforcement positions by the agency but are not eligible for retirement benefits under either 5 U.S.C. 8336(c) or 8412(d).

IV. DISCUSSION

Employees eligible to participate in the benefits of FLEPRA are defined in Section 402 of the Act which states, for the purposes of this title, except as otherwise provided [exceptions not relevant here], the term "law enforcement officer" means any law enforcement officer within the meaning of Section 8331(20) or Section 8401(17) of title 5, United States Code, with respect to whom the provisions of chapter 51 of such title [Classification] apply.[FN3]

Although FLEPRA does not deal with retirement benefits, the definitions of law enforcement officer from the Civil Service Retirement and Federal Employee Retirement systems are used to determine eligibility. Thus, in order to qualify for benefits under this statute, INS law enforcement personnel must meet the definition of either 5 U.S.C. 8331(20) or 8401(17). As with law enforcement retirement benefits, the benefits of FLEPRA are not associated with a position per se; rather, the benefits are payable to employees who meet a specified definition and occupy an appropriate position.

Under 5 U.S.C. 8331(20) and 8401(17), all employees directly engaged in the specified activities are law enforcement officers. These employees are commonly referred to as having "primary" law enforcement coverage for retirement purposes.

Persons holding positions that have supervisory or administrative responsibilities for "primary-covered" employees may also meet the definition of law enforcement officer, but only when the employee moves directly to such a position from a law enforcement position in which they had primary coverage. Persons who move into a supervisory law enforcement position from any other type of position (than one in which they had primary coverage) do not meet the definition of law enforcement officer for purposes of FLEPRA.

Eligibility under FLEPRA is expressly limited to persons who meet specific definitions drawn from existing law. The language of the statute is clear and unambiguous. Persons not meeting one of the two definitions are not eligible for FLEPRA benefits despite the nature of the duties of the position they occupy.[FN4]

Moreover, there is no legislative history which would support a different interpretation than that derived from the plain language of the statute. In our view, the only means by which ineligible employees could become eligible is through amendment of the statute. A representative of the staff of the Treasury, Post Office, and General Government Subcommittee of the Senate Committee on Appropriations, stated her belief that neither INS nor the Office of Personnel Management has the authority to expand the application of these benefits. That Subcommittee staff is, however, working with the Department of Justice to effect the statutory amendment necessary to expand the definition of law enforcement employees eligible for benefits under FLEPRA.

V. CONCLUSION

In order to be eligible for FLEPRA's benefits and incentives an employee must meet the definition of "law enforcement officer" contained in either 5 U.S.C. 8331(20) or 8401(17). Persons not meeting either of those definitions are not eligible for the benefits and incentives of FLEPRA.

If you wish further assistance on this matter please contact Paul W. Virtue, Deputy General Counsel, at 514-2895.

/s/ GROVER JOSEPH REES III

General Counsel

Genco Opinion 91-75

Legal Opinion Your April 10, 1991, Memorandum: Request for Advisory Opinion: Returning minor without Form I-551

Peter E. Batchelder, Acting Associate Regional Commissioner Eastern Region

CO 204.21-C

November 11, 1991

I. QUESTIONS

In the subject memorandum, you transmitted to James A. Puleo, Associate Commissioner, Examinations, a case that is now pending before the United States vice consul in Port-au-Prince, Haiti. Mr. Puleo referred your memorandum to us. According to the vice consul, the case appears to involve the following facts:

> An alien minor was admitted to the United States for permanent residence on June 25, 1989. Shortly thereafter, his father sent him back to Haiti for school. The father continues to live in the United States. The alien minor now wants to return to the United States. He claims that his father took his alien registration receipt card from him when he left the United States. He has filed an application (Form I-90) for replacement of his alien registration receipt card.
>
> This opinion addresses the following questions:
> A. Does this alien minor remain a lawful permanent resident alien?
> B. Should the Government provide the alien minor with a travel document to facilitate his return to the United States?

II. SUMMARY CONCLUSIONS

A. If the facts outlined above prove to be true, then the alien minor remains a lawful permanent resident.

B. The Service may grant the alien's application for replacement of his alien registration receipt card. Since the alien has been abroad for more than one year, however, this card will not be a valid travel and entry document. The alien must also seek either a returning resident's visa from the consul and a passport from Haitian authorities OR a waiver of the requirement to present valid travel and entry documents.

III. ANALYSIS

A. If the Facts Outlined Above Prove to Be True, Then the Alien minor Remains a Lawful Permanent Resident

An alien who has been lawfully admitted to the United States for permanent residence may lose permanent resident status by leaving the United States with the intent to remain abroad indefinitely. See Matter of Kane, 15 I&N Dec. 258 (BIA 1975). If the alien takes his or her alien minor children, then the alien parent's loss of status is imputed by law to the children. Matter of Huang, 19 I&N Dec. 749, 750 n. 1 (BIA 1988); Matter of Zamora, 17 I&N Dec. 395, 397 (BIA 1980); Matter of Winkens, 15 I&N Dec. 451, 452 (BIA 1975). This case appears to be somewhat different from these Board cases, since in this case the parent has sent the alien minor abroad, but has apparently remained in the United States. We believe, nevertheless, that the principle embodied in Huang, Zamora, and Winkens applies to this case as well. The father's intent in sending his son abroad, therefore, is the critical issue in determining whether the alien minor in this case remains a permanent resident.

From the facts presented to us, it appears that the father did not intend his son to lose his status as a lawful permanent resident. The letter from the vice consul in Port-au-Prince indicates that she learned from a telephone conversation

with the alien minor's stepmother that his father "wants the son to complete school … in Haiti." The vice consul's letter does not indicate whether the stepmother was in Haiti or in the United States at the time. It would be prudent for the Service to interview the father directly on this issue. If it were to prove, for example, that the father and stepmother took the whole family back to Haiti, intending to remain there permanently, then the alien minor would no longer be a permanent resident. Huang, Zamora, and Winkens, supra.

Matter of Sias, 11 I&N Dec. 171 (BIA 1965) does not require a different conclusion. In that case, a Mexican minor's father returned her to Mexico on the very day of her admission for permanent residence. Id. at 172. She was seven years old at the time and, except for brief visits, had never returned to the United States. At the time of the Board's decision, the alien was approximately 18 years old and married to a United States citizen. The Board held that she was not entitled to admission as a returning resident alien. The Board based its decision, in part, on the proposition that, because the alien returned to Mexico immediately after her admission, she had never acquired a residence in the United States, as defined by Section 101(a)(33) of the Act, and so had never become an alien lawfully admitted for permanent residence. Id. at 173. The Board has since then expressly rejected this proposition. Huang, 19 I&N Dec. at 755. Thus, it appears that Sias has been overruled by necessary implication. Even if Sias is still viable, this case is distinguishable. It appears that the parent in Sias sent his children back to Mexico, intending them to remain and reside there permanently. See 11 I&N Dec. at 172. In this case, by contrast, the alien claims that his father sent him back to Haiti for a temporary purpose: to complete his education there. If this claim proves true, then this alien remains a permanent resident.

B. The Service May Grant the Alien's Form I-90, if the Service is Satisfied that the Alien Remains a Permanent Resident

While in Haiti, the alien minor completed a Form I-90, Application by Lawful Permanent Resident for New Alien Registration Receipt Card. If the Service is satisfied that the alien minor is still a permanent resident, the Service may appropriately approve this application. Because the alien minor has been abroad for more than one year, however, the replacement alien registration receipt card would not be valid for entry into the United States. 8 C.F.R. 211.1(a)(1)(i)(A). The alien minor, therefore, would still need to obtain valid entry and travel documents. There are two alternatives available to him. He could obtain a Haitian passport, and then submit to the consul in Port-au-Prince an application for a returning resident's visa. See INA 101(a)(27)(A), 8 U.S.C. 1101(a)(27)(A). In the alternative, he could simply submit an application for a waiver of the documentary requirements (Form I-193) to the district director in charge of his intended port of entry. Id. 211(b), 8 U.S.C. 1181(b); 8 C.F.R. 211.1(a)(3) and 211.2. The Form I-193 would be necessary, in addition to the Form I-90, because the alien has been abroad for more than one year. 8 C.F.R. 211.1(a)(3). If the district director were to grant this waiver, then the consul could issue a "transportation letter" to facilitate the alien's return to the United States.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-76

Legal Opinion Effect of amendments to waivers of the Section 216(c) joint petition requirement

James A. Puleo Associate Commissioner

CO 216-C

November 29, 1991

ATTN: Yolanda Sanchez-K., Senior Immigration Examiner

I. QUESTIONS

Congress recently amended the provisions governing waiver of the joint petition requirement imposed on aliens admitted for permanent residence on a conditional basis under Section 216 of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1186a. Immigration Act of 1990 ("1990 Act"), Pub. L. No. 101-649, 701, 104 Stat. 4978, 5085 (1990). This amendment has given rise to the following questions:

A. Have the "extreme hardship" and "good faith" waivers been combined into a single waiver provision, so that an alien must now show that his or her deportation would cause extreme hardship in order to obtain a "good faith" waiver?

B. Must an alien seeking a "good faith" waiver prove that he or she was not at fault in the dissolution of the marriage that was the basis of the alien's admission under Section 216?

The Northern Regional Counsel brought Question A to our attention, at the behest of the Denver district. The Southern Regional Counsel raised Question B on behalf of the Dallas district. The New Orleans district has denied at least one "good faith" waiver because the alien failed to prove that he was not at fault in the breakup of the marriage. See Letter from D. Marlowe and S. Cobb to Yolanda Sanchez (June 6, 1991).

II. SUMMARY CONCLUSIONS

A. "Extreme hardship" and "good faith" remain independent grounds for waiving the Section 216 joint petition requirement. Thus, an alien need not prove that his or her deportation would cause extreme hardship in order to obtain a "good faith" waiver.

B. An alien seeking a "good faith" waiver of the Section 216 joint petition requirement need not show that he or she was not at fault in the dissolution of the marriage that was the basis of the alien's admission under Section 216. The Service may, however, examine the circumstances surrounding the breakup of the marriage in determining whether the alien spouse married in good faith and not for purposes of evading the immigration laws.

III. ANALYSIS

In 1986, Congress enacted the Immigration Marriage Fraud Amendments Act (IMFA), Pub. L. No. 99-639, 100 Stat. 3537 (1986). IMFA amended the INA by adding Section 216. Id. 2(a), 100 Stat. at 3537. This amendment imposes conditions on the permanent resident status of an alien who acquires this status on the basis of a recent marriage. INA 216(a)(1), (g)(1) and (g)(2), 8 U.S.C. 1186a(a)(1), (g)(1) and (g)(2). The conditions may be removed if the spouses timely file a joint petition for removal of the conditions. Id. 216(c)(1), 8 U.S.C. 1186a(c)(1). They must file this joint petition during the 90-day period before the second anniversary of the alien's acquisition of permanent residence, although the Attorney General may accept an untimely petition. Id. 216(d)(2), 8 U.S.C. 1186a(d)(2).

The Attorney General may also waive the joint petition requirement entirely in some cases. As originally enacted, Section 216 provided two bases upon which a waiver could be granted:

> The Attorney General, in the Attorney General's discretion, may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of paragraph (1) if the alien demonstrates that—
> (A) extreme hardship would result if such alien is deported, or
> (B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) by the alien spouse for good cause and the alien was not at fault in failing to meet the requirements of paragraph (1). In determining extreme hardship, the Attorney General

shall consider circumstances occurring only during the period that the alien was admitted for permanent residence on a conditional basis.

INA 216(c)(4), 8 U.S.C. 1186(c)(4) (1988).

The 1990 Act amended the waiver grounds. 1990 Act, Pub. L. No. 101-649, 701, 104 Stat. at 5085. The amendment deleted the requirement that an alien seeking a "good faith" waiver prove that the marriage was terminated "by the alien spouse for good cause." Id. 701(a)(2), 104 Stat. at 5085. The amendment also added a new waiver ground for conditional resident aliens subjected to domestic violence. Id. 701(a)(4) and (5), 104 Stat. at 5085-6. The amended waiver provision reads:

The Attorney General, in the Attorney General's discretion, may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of paragraph (1) if the alien demonstrates that—
(A) extreme hardship would result if such alien is deported,
(B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1), or
(C) the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by his or her spouse or citizen or permanent resident parent and the alien was not at fault in failing to meet the requirements of paragraph (1).

In determining extreme hardship, the Attorney General shall consider circumstances occurring only during the period that the alien was admitted for permanent residence on a conditional basis. The Attorney General shall, by regulation, establish measures to protect the confidentiality of information concerning any abused alien spouse or child, including information regarding the whereabouts of such spouse or child.

INA 216(c)(4), 8 U.S.C. 1186a(c)(4), as amended by, 1990 Act, Pub. L. No. 101-649, 701, 104 Stat. at 5085.

A. "Extreme Hardship" and "Good Faith" Remain Separate Waiver Grounds

When Congress first enacted Section 216, it clearly intended that "extreme hardship" and "good faith" were separate grounds for waiving the joint petition requirement. This intent is shown by the use of "or" as the connective between subsections 216(c)(4)(A) and 216(c)(4)(B). INA 216(c)(4), 8 U.S.C. 1186(c)(4) (1988); see also H. Rep. No. 906, 99th Cong., 2d Sess. 7 (1986). The argument that an alien must now show "extreme hardship" in order to obtain a "good faith" waiver is premised on the deletion of "or" between these two subsections. See 1990 Act, Pub. L. No. 101-649, 701(a)(1), 104 Stat. at 5085.

It may be that the caption to Section 216(c)(4) is the source of this misunderstanding confusion, since the caption refers to "Hardship waiver." INA 216(c)(4), 8 U.S.C. 1186(c)(4). The 1990 Act did not change this caption. See 100 Stat. at 3539. If a statute is ambiguous, its caption may be used to resolve the ambiguity, if Congress itself, rather than a revisor, inserted the caption. Hardin v. City Title & Escrow Co., 797 F.2d 1037, 1039 (D.C. Cir. 1986). The caption does not, however, control over the plain language of the statute itself. Railroad Trainmen v. B & O R. Co., 331 U.S. 519, 528–9 (1947). The meaning of a Section 216(c)(4) is to be found in the statute's language. Mallard v. United States Dist. Ct. for South. Dist. of Iowa, 109 S.Ct. 1814, 1818 (1989); INS v. Phinpathya, 464 U.S. 183, 189 (1984); Richards v. United States, 369 U.S. 1, 9 (1962). The suggestion that an alien must now show "extreme hardship" in order to qualify for a "good faith" waiver is untenable, since the text of Section 216(c)(4) itself does not support the suggestion. When a sentence includes a series of more than two elements, the standard stylistic device is to place the connective only after the penultimate element. See, e.g., W. Strunk, Jr., and E.B. White, The Elements of Style 27 (3d ed. 1979). The "or" that now is placed between subsections (B) and (C) also serves as a disjunctive connective between (A) and (B). The un-

strained reading of the text of Section 216(c)(4), therefore, indicates that there are now three independent bases for a waiver: extreme hardship, good faith, and domestic abuse. INA 216(c)(4), 8 U.S.C. 1186a(c)(4), as amended by 1990 Act, Pub. L. No. 101-649, 701, 104 Stat. at 5085.

Even assuming, arguendo, that Section 216(c)(4) is ambiguous on this point, the legislative history of Section 216(c)(4) provides no evidence that Congress intended to abolish the separate "extreme hardship" waiver or to make the "good faith" waiver more difficult to obtain. In 1986, Congress clearly intended two separate bases for waiving the joint petition requirement: extreme hardship and good faith marriage terminated for good cause. H. Rep. No. 906, supra, at 7. By enacting the 1990 amendment, Congress intended to add a third ground for granting the waiver and to remove one procedural obstacle in the requirements for the "good faith" waiver. See H. Rep. No. 955, 101st Cong., 2d Sess. 127; H. Rep. No. 723 (Part 1), 101st Cong., 2d Sess. 78–9 (1990). We conclude that an alien need not prove that his or her deportation would cause extreme hardship in order to obtain a "good faith" waiver under the amended Section 216(c)(4).

B. An Alien Seeking a "Good Faith" Waiver Need Not Show that He or She Was Not at Fault in the Dissolution of the Marriage

An alien seeking a "good faith" waiver is no longer required to show that the marriage which was the basis of the alien's acquisition of permanent residence was terminated "by the alien spouse for good cause." See 1990 Act, Pub. L. No. 101-649, 701(a)(2), 104 Stat. at 5085. The argument that the alien must still prove that he or she was not at fault in the dissolution of the marriage is premised on the concluding language of Section 216(c)(4)(B): "and the alien was not at fault in failing to meet the requirements of paragraph (1)." INA 216(c)(4)(B), 8 U.S.C. 1186a(c)(4)(B). "The requirements of paragraph (1)" are satisfied by the proper filing of the joint petition. Id. 216(c)(1), 8 U.S.C. 1186a(c)(1). We conclude that an alien is not required affirmatively to show that he or she was not at fault in the dissolution of the marriage. The Service is not, however, barred from examining the circumstances of the dissolution, insofar as these circumstances may be relevant in determining whether "the qualifying marriage was entered into in good faith by the alien spouse." Id.

The amendment of Section 216(c)(4)(B) creates an ambiguity. Deletion of the "good cause" requirement suggests that fault in the termination of the marriage is no longer an eligibility requirement. Yet, Congress retained "fault in failing to meet" the joint petition requirement as an element of the "good faith" waiver. Committee reports, of course, are no substitute for the text of the bill actually passed by Congress and enacted upon the President's approval. See Thompson v. Thompson, 108 S.Ct. 513, 523 (1988) (Scalia, J., concurring in the judgment). These reports can, however, provide evidence which may be helpful in construing an ambiguous statute. See Davis v. Lukhard, 788 F.2d 973, 981 (4th Cir.), cert. denied 479 U.S. 868 (1986); Demby v. Schweiker, 671 F.2d 507, 510 (D.C.Cir. 1981).

The deletion of the phrase "by the alien spouse for good cause" resulted from the Conference Committee's adoption of a House proposal that had no Senate alternative. See H. Rep. No. 955, supra, at 127. The final version carries over the House proposal almost verbatim. Compare 1990 Act, Pub. L. No. 101-649, 701, 104 Stat. at 5085, with H.R. 4300, 101st Cong. 2d Sess. 301 as reported in H.Rep. No. 723, part 1, supra, at 25.[FN1] In discussing the proposed amendment, the House Report states:

> In addition, the phrase "by the alien spouse for good cause" is removed from current INA Section 216(c)(4)(B), allowing aliens to file for removal of conditional basis even if they were not the moving party in terminating a marriage. The change will allow the alien to file independently for a waiver if the marriage was entered into in good faith and the marriage has been terminated or termination proceedings have commenced.

H. Rep. No. 723, part 1, supra, at 79. The most reasonable inference from this paragraph is that an alien seeking a good faith waiver is now required to prove only two things: that he or he married in good faith and that the marriage has been dissolved.[FN2] The alien need not affirmatively establish that he or she was not "at fault" in the breakup of the

marriage. The phrase "and the alien was not at fault in failing to meet the requirements of paragraph (1)," INA 216(c)(4)(B), 8 U.S.C. 1186a(c)(4)(B), should not be seen as an additional eligibility requirement. Rather, given the repeal of the "good cause" requirement, the more reasonable interpretation is that this phrase represents a recognition that, once the marriage is dissolved, the alien cannot, as a matter of law, comply with the joint petition requirement imposed by Section 216(c)(1).

This interpretation does not preclude the Service from examining the circumstances leading to the dissolution of the marriage. The alien must affirmatively establish that the marriage in question "was entered into in good faith by the alien spouse." INA 216(c)(4)(B), 8 U.S.C. 1186a(c)(4)(B). The Service should examine "good faith" waivers closely. Where there is doubt about the bona fides of the marriage, the Service may want to interview both of the former spouses. The Service may also properly request the types of evidence outlined in 8 C.F.R. 216.4(a)(5).

The issue, however, is not whether the alien might have been "at fault" under the marriage dissolution laws of the jurisdiction that granted the dissolution. Thus, the interest of the Service is not in ascertaining and assigning blame. Rather, the interest of the Service is in assuring that "the qualifying marriage … was not entered into for the purpose of procuring an alien's entry as an immigrant," see id. 216(d)(1)(A)(i)(III), 8 U.S.C. 1186a(d)(1)(A)(i)(III), and that the citizen or permanent resident who filed the visa petition did not receive a fee or other consideration for doing so, id. 216(d)(1)(A)(ii), 8 U.S.C. 1186a(d)(1)(A)(ii). If the marriage was bona fide, then the Service may grant a waiver, even if the dissolution court attributed responsibility for the breakup of the marriage to the alien spouse. If the marriage was not bona fide, then the Service may not grant a waiver even if the dissolution court attributed responsibility to the other spouse or granted a "no fault" dissolution.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-77

Service of Orders to Show Cause Upon Salvadorans Granted TPS

G.H. Kleinknecht, Associate Commissioner, Enforcement

CO 303

December 2, 1991

This responds to your memorandum dated September 24, 1991 in which you ask whether it is permissible to delay the requirement contained in Section 303(d)(1) of the Immigration Act of 1990 (IMMACT) which requires the Service to serve an Order to Show Cause (OSC) upon Salvadorans granted Temporary Protected Status (TPS) at the registration occurring closest to the date of termination of the designation of El Salvador.

It is our opinion that the statute mandates service of the OSCs at the final registration period and that the Service would be in violation of law should it fail to do so. Furthermore, the ABC agreement recognized and specifically accommodated the statutory requirement through the language contained in paragraph 11 of the agreement which states that "Salvadorans who were granted Temporary Protected Status and are issued orders to show cause pursuant to Section 303(d)(1) of the Immigration Act of 1990 may be placed in deportation proceedings at any time after January 1, 1992. Such proceedings will be administratively closed until the adjudication process before the Asylum Officer is completed."

There does exist case law supporting the district director's discretion as to whether to institute deportation proceed-

ings. Matter of Marin, 16 I&N Dec. 581 (BIA 1978); Matter of Lennon, 15 I&N Dec. 9, 14 (BIA 1974); Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971). However, it does not appear that such discretion would apply in this instance due to the clear language of 303(d)(1) which reads as follows:

> At the registration occurring under this section closest to the date of termination of the designation of El Salvador under subsection(a), the Immigration and Naturalization Service shall serve on the alien granted temporary protected status an order to show cause that establishes a date for deportation proceedings which is after the date of such termination of designation.

The statutory language specifically mandates the time at which a Salvadoran granted TPS is served with the OSC. Although the Attorney General may have discretion to terminate, or otherwise not pursue the deportation proceedings in a particular case, it does not appear that the statute permits the Attorney General to delay the service of the OSC. A basic principle of statutory construction is that courts will assume that the legislative intent will be expressed by giving the ordinary meaning to the words of the statute. INS v. Phinpathya, 464 U.S. 183, 189 (1984); American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982); Richards v. United States, 369 U.S. 1, 9 (1962); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).

Although Congress might have written Section 303 differently had the ABC agreement been in existence at the time that Section 303 was drafted, the Service may not delay implementing this section without altering both the letter and spirit of the statutory provision. For the same reason, and because it will create yet another step in the process, we advise against serving the aliens with a "Notice of Intent to Issue an Order to Show Cause" as suggested in your memorandum.

We share your concerns regarding the expenditure of resources to effect the service of OSCs on the Salvadorans granted TPS when a significant number of those cases will be administratively closed. However, the service of the OSCs at the third registration period may ultimately be beneficial to the Service. It is probable that a significant percentage of the ABC class members will not be granted asylum. In those cases, the Service will have saved future resources by having already served those aliens with OSCs.

In order to conserve resources and prepare the OSCs as efficiently as possible, we recommend that the field prepare "form" OSCs. Such OSCs would be filled-out with the information common to all recipients such as the country of citizenship and the charge of deportability, i.e. 241(a)(1)(B) entry without inspection. Such OSCs would require only the execution of the alien specific data related to name, date and place of entry. The OSCs may also be signed or pre-stamped with the signature of any official authorized to issue OSCs under 8 C.F.R. 242.1(a)(1)–(17).

If you have any questions, or wish to discuss further please contact Cristina Hamilton at extension 2895.

/s/ GROVER JOSEPH REES III

General Counsel

Genco Opinion 91-78

Legality of Using Job Corps Trainees to Repair Border Fencing Pursuant to the Job Training Partnership Act of 1982

Michael S. Williams, Chief, Border Patrol

December 3, 1991

This responds to your August 23, 1991, request for an opinion on using Job Corps trainees to repair border fencing. You attached an August 6, 1991, memorandum from Gustavo De La Vina, Chief Patrol Agent for the San Diego Sector,

who indicated that Congressman Duncan Hunter had contacted his office and offered the services of 25 welder trainees to construct border fence panels at a safe distance from the actual border. We set forth below why we conclude that the San Diego Sector may accept Congressman Hunter's offer of assistance.

On October 13, 1982, the Job Training Partnership Act became law and, among other things, created a Job Corps administered by the U. S. Department of Labor.[FN1] Job Corps centers are located throughout the country in both rural and urban areas and provide training, education, residential and a variety of other support services necessary to prepare disadvantaged youth between the ages of fourteen and twenty-two to become responsible and productive members of society.[FN2] The overall objective of all Job Corps activities is to enhance a youth's employability and successful placement in the general workforce.[FN3]

One method used by Job Corps centers to develop these skills is through vocational training programs.[FN4] Training can be provided at Job Corps center classrooms, shops, laboratories or, off-center worksites.[FN5] Few restrictions are placed on the type of work to be performed, other than that vocational training must develop specific skills necessary for placing the youth participants in their vocation within the civilian community.[FN6] Based on these considerations, it is our opinion that the welding of border fence panels is the kind of vocational training reasonably contemplated under the Act.

The Act specifically addresses concerns regarding the Federal employment status of Job Corps trainees.[FN7] Generally, participants are not considered Federal employees and they are not subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of employment, leave, and unemployment compensation. Local center directors are responsible for the health, safety and discipline of trainees.[FN8] Trainees are considered Federal employees for purposes of compensation for work-related injuries or death.[FN9] For purposes of the Federal Tort Claims Act, trainees are considered employees of the Government.[FN10] Claims relating to Federal torts or disability and death benefits are adjusted and settled by or through the Department of Labor.[FN11] On balance, we do not believe that these liability considerations should preclude accepting assistance in this instance, considering the nature of work contemplated and the precautions taken to locate the participants away from the actual border.

In summary, we do not find any legal impediment to using Job Corps trainee welders in this instance.

/s/ GROVER JOSEPH REES III

General Counsel

Genco Opinion 91-79

Legal Opinion: INA 273 Fine - Visa Invalid for Purposes of the Visit

G. Thomas Graber, Director, National Fines Office

CO 273

CO 280

December 3, 1991

I. Question Presented

Can the Immigration and Naturalization Service (INS) impose a fine on a carrier under Section 273 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1323, for bringing an alien passenger who does not have an unexpired visa to the United States, when the alien passenger in question is seeking admission as a nonimmigrant visitor for pleasure and has in his possession only an unexpired D-1 crewman visa?

II. Summary Conclusion

Yes, INS can fine a carrier under Section 273 of the Act for bringing an alien passenger seeking admission as a nonimmigrant visitor for pleasure who has in his possession only an unexpired D-1 crewman visa to the United States.

III. ANALYSIS

Section 273 of the Act requires that an alien brought to the United States on board a vessel/aircraft must have a valid passport and an unexpired visa, if a visa is required under the Act or regulations promulgated pursuant to its authority, and that the carrier must pay a fine of $3,000 for each alien brought here in violation of this section. 8 C.F.R. 212.1 states that each arriving nonimmigrant alien must present a valid, unexpired passport and visa. 22 C.F.R. 41.12 states that the type of visa issued to a temporary (and thus nonimmigrant) alien visitor for pleasure is a B-2 visa, and that the type issued to a crew member is a D visa. 8 C.F.R. 251.1(d) divides D visas into two types, D-1 or D-2, depending on whether an alien is to leave within 29 days on either the ship that brought him or on another ship.

It is clear that the alien passenger in the question presented has a visa which is invalid for the purposes of his visit. He is a passenger on the vessel, not a crewman. Also, he wants to visit for pleasure for six months, rather than 29 days of shore leave. Thus, he needs a B-2 visitor-for-pleasure visa, not a D-1 crewman visa. Accordingly, because the alien passenger has a visa which is invalid for the purposes of his visit, he would be excluded from entering the United States under Section 212(a)(7)(B)(i)(II) of the Act, 8 U.S.C. 1182(a)(7)(B)(i)(II).

The question posed by the National Fines Office is whether INS can fine the carrier under 273 of the Act, despite the fact that the alien passenger does have in his possession an unexpired visa. This is a case of first impression. The answer is yes, the carrier may be fined because the visa must be a valid one. 8 C.F.R. 212.1 requires an arriving nonimmigrant alien to have an unexpired, valid visa. The Board of Immigration Appeals has held that "Section 273(a), in effect, makes the carrier of aliens an insurer that his passengers have met the visa requirements of the Act and that any bringing to the United States of an alien who does not meet these requirements incurs liability." See Matter of M/V "Runaway", 18 I&N Dec. 127 (BIA 1981), at 128. Thus, because the alien passenger has an invalid visa, and because the carrier is an insurer that the visa requirements are met, a fine is appropriate.

IV. Conclusion

It is appropriate for INS to levy a fine under 273 of the Act against a carrier who brings an alien passenger with a visa invalid for the purposes of the visit to the United States.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-80

Legal Opinion: Treatment of Juvenile Drug Offenses for Immigration Purposes

H. Edward Odom, Chief, Advisory Opinions Division Department of State

December 3, 1991

Issue Presented

Whether a juvenile alien who has been convicted of a minor drug offense in a foreign country is, thereafter, excludable under Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (Act) and is, therefore, inadmissible to the United States.

Summary Conclusion

An alien who commits a minor drug offense while under the age of eighteen and who is convicted of that offense in a foreign country is a juvenile delinquent for immigration purposes. The alien is not excludable under Section 212(a)(2)(A)(i)(II) of the Act and is not inadmissible to the United States because of that conviction.

Analysis

In order for a foreign conviction to serve as a basis for a finding of inadmissibility, the conviction must be for conduct deemed criminal by United States standards. Matter of McNaughton, 16 I&N Dec. 569 (BIA 1978).

An act of juvenile delinquency[FN1] is not a crime in the United States and an adjudication of delinquency is not a conviction for a crime within the meaning of the Act. Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981).

The Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. 5031 et seq., governs whether a foreign offense is to be considered a delinquency or a crime by United States standards. Matter of Ramirez-Rivero, supra. According to Section 5302 of the FJDA,

> [A] juvenile alleged to have committed an act of juvenile delinquency … shall not be proceeded against in any court of the United States unless … the offense charged is a crime of violence that is a felony or an offense described in Section 401 of the Controlled Substances Act (21 U.S.C. 841) [drug trafficking crimes], or Section 1002(a), 1003, 1005, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 955, 959, 960(b)(1), (2), (3)) [drug importation/exportation crimes], or Section 922(p) of this title [firearm offenses] … .

Therefore, a minor drug offense, such as simple possession, is a delinquency and not a crime in the United States if committed by a person under the age of eighteen. It follows then that a foreign conviction for a minor drug offense committed by a juvenile would be considered a delinquency and not a crime for U.S. immigration purposes.

Conclusion

An alien who was convicted of a minor drug offense in a foreign country who was under the age of eighteen at the time of the commission of the offense has not been convicted of a crime for U.S. immigration purposes and is, therefore, not excludable under Section 212(a)(2)(i)(II) of the Act or inadmissible to the United States for such offense.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-81

Legal Opinion Your February 26, 1991 Memorandum: IJ Standard of Review of Section 216 Hardship and Good Faith

Waivers

Jack Penca, Regional Counsel, Eastern Region

CO 216

December 3, 1991

I. QUESTIONS

In the subject memorandum, you request a Legal Opinion concerning the following question:

Under what standard of review may an immigration judge review a request for a waiver of the Section 216 joint petition requirement, after the Service has denied the waiver and instituted deportation proceedings?

This memorandum will also address the following additional issue:

When an immigration judge reviews a denial of a waiver of the joint petition requirement, does the burden of proof rest with the alien or the Service?

II. SUMMARY CONCLUSIONS

A. We agree with your conclusion that an immigration judge reviews a request for a waiver of the Section 216 joint petition requirement de novo.

B. When an immigration judge reviews a denial of a waiver of the joint petition requirement, the alien bears the burden of proof.

III. ANALYSIS

A. An Immigration Judge May Review De Novo a Service Decision Denying a Waiver of the Section 216 Joint Petition Requirement

The Immigration and Nationality Act (INA), as amended, imposes a two-year conditional period on the permanent resident status of aliens who acquire this status based on recent marriages. INA 216(a)(1), 8 U.S.C. 1186a(a)(1). At the end of the two year period, the couple must file a joint petition for removal of the conditional basis of the permanent resident status. Id. 216(c) and (d), 8 U.S.C. 1186a(c) and (d). The law provides, however, that the alien may apply for a waiver of this joint petition requirement. Id. 216(c)(4), 8 U.S.C. 1186a(c)(4). The Attorney General may grant this waiver if:

— extreme hardship would result if the alien is deported;

— the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the joint petition requirement; or,

— the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by his or her spouse or citizen or

permanent resident parent and the alien was not at fault in failing to meet the joint petition requirement.

Id. The statute entrusts the decision to grant or deny a waiver to the discretion of the Attorney General, so long as at least one of these three factors is present. Id.

The regulations implementing this waiver provision vest jurisdiction of a waiver application in "the regional service center [RSC] director having jurisdiction over the alien's place of residence." 8 C.F.R. 216.5(c). Although there is no direct administrative appeal of the RSC director's decision, the alien may seek "review of the denial before an immigration judge in deportation proceedings." Id. 216.5(f). The immigration judge's jurisdiction is limited to those cases in which the alien has first applied for the waiver before the RSC director. Matter of Lemhammad, Interim Decision 3151 (BIA May 22, 1991). If the alien has not applied before the RSC director, therefore, the immigration judge has no authority to grant the waiver. Id.

The alien is entitled by statute, however, to challenge the termination of status in deportation proceedings. Id. 216(b)(2), (c)(2)(B) and (3)(D), 8 U.S.C. 1186a(c)(2)(B) and (3)(D). By regulation, the alien is entitled to challenge a denial of a waiver of the joint petition requirement. 8 C.F.R. 216.5(f). The regulations do not specify the standard of review an immigration judge is to adopt in reviewing a waiver denial. If the immigration judge sustains the RSC director's denial of the waiver of the joint petition requirement, the alien may lose his or her permanent resident status and be ordered deported. Id. 216(c)(2) and 241(a)(1)(D)(i), 8 U.S.C. 1186a(c)(2) and 1251(a)(1)(D)(i). Because of the interests at stake for the alien, the alien is entitled to a hearing on his or her waiver request. See Kwong Hai Chew, supra.

This right to a hearing, however, would be largely nugatory if the immigration judge could not review a denial of a Section 216 waiver de novo. The RSC director is not required to conduct an interview in every case. 8 C.F.R. 216.5(d). Even when such interviews are conducted, it is not a common practice to keep verbatim transcripts. Before the immigration judge, by contrast, an alien has a right to present testimony and other evidence, INA 242(b)(3), 8 U.S.C. 1252(b)(3), and the hearing is recorded verbatim, 8 C.F.R. 3.26 and 242.15. Furthermore, determining whether to grant a waiver is entrusted to the Attorney General's sound discretion. INA 216(c)(4), 8 U.S.C. 1186a(c)(4). The Attorney General has delegated the exercise of this discretion to the RSC director in the first instance. 8 C.F.R. 216.5(c). The Attorney General has also delegated this discretion to the immigration judge. Id. 216.5(f). The only limitation placed on the immigration judge's discretion is that the alien must first have sought the waiver from the RSC director. Id.; see also Lemhammad, supra. Nothing in the regulation suggests that the discretion entrusted to the immigration judge is not in all other respects as broad as the RSC director's discretion. This discretion would necessarily be circumscribed considerably, however, if the immigration judge could not receive such evidence and testimony as the immigration judge considered relevant to the exercise of discretion.

The requirement of a complete record is important for another reason as well. The Supreme Court has recently recognized the importance of a complete administrative record in assuring meaningful judicial review of an administrative proceeding. See McNary v. Haitian Refugee Center, 111 S.Ct. 888, 898 (1991). An alien may challenge a deportation order by appeal to the Board of Immigration Appeals, 8 C.F.R. 3.1(b)(2) and 3.36, and then in the appropriate United States Court of Appeals, INA 106, 8 U.S.C. 1105a. If the immigration judge cannot create a complete record on the waiver issue, then the review by the Board or the court of appeals would be as perfunctory as the review by the immigration judge. If the immigration judge creates a complete record, by contrast, then both the Board and the court of appeals would be presented with the complete record necessary "to provide meaningful review" of the waiver issue. See McNary, supra.

B. When an Immigration Judge Reviews a Denial of a Waiver of the Joint Petition Requirement, the Alien Bears the Burden of Proof

The regulation implementing the Section 216 waiver provision does not indicate which party bears the burden of proof when an immigration judge reviews an RSC director's decision denying a waiver. 8 C.F.R. 216.5(f). The Service

bears the burden of establishing the allegations necessary to support a charge of deportability. See Woodby v. INS, 385 U.S. 276 (1966). The grant or denial of a waiver of the Section 216 joint petition requirement, however, is not a necessary element in establishing deportability. Rather, the Section 216 waiver provision is essentially a form of discretionary relief from deportation. The granting of a waiver enables the alien to retain his or her permanent resident status notwithstanding the amenability to deportation that results from failure to comply with the joint petition requirement. INA 216(c)(4), 8 U.S.C. 1186a(c)(4). While the Service may bear the burden of proving a charge of deportation, Woodby, supra, the alien bears the burden of proving that he or she is eligible for any form of discretionary relief from deportation and that he or she merits a favorable exercise of discretion. 8 C.F.R. 242.17(e). Section 216(c)(4) of the Act provides that the Section 216 waiver is available only if the alien "demonstrates" that at least one of the three statutory bases for granting the waiver exists. INA 216(c)(4), 8 U.S.C. 1186a(c)(4). We conclude, therefore, that the alien, rather than the Service, bears the burden of proof when an immigration judge reviews a denial of the Section 216 joint petition requirement.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-82

Equal Access to Justice Act Reporting Requirements

Chris Sale, Executive Associate Commissioner Management

CO 779-C

December 3, 1991

This is is response to your memorandum of September 30, 1991, concerning the Immigration and Naturalization Service's (INS) responsibilities under DOJ Order 2110.45, "Reporting Requirements Under the Equal Access to Justice Act" (EAJA), dated July 14, 1988. As explained below, INS currently does not conduct any proceedings within the scope of the order. Accordingly, we need not file a report.

The order states that its reporting requirements are activated "whenever a Department [of Justice] organization conducts an adversary adjudication." It subsequently defines an adversary adjudication as:

> a proceeding under 5 U.S.C. 554 in which the position of the Department is represented by counsel or otherwise … and any appeal of a decision made pursuant to Section 6 of the Contracts Disputes Act of 1978 (41 U.S.C. 605) before a Board of Contract Appeals as provided in 41 U.S.C. 607.

The language quoted above from the DOJ Order is based on the EAJA itself. 5 U.S.C. 504(b)(1)(C).

It is INS's position that its adversary adjudications are conducted under the Immigration and Nationality Act rather than under 5 U.S.C. 554. See, e.g., Ardestani v. U.S. Dept. of Justice, I.N.S., 904 F.2d 1505 (11th Cir. 1990), cert. granted, — U.S. —, 111 S.Ct. 1101 (1991); 28 C.F.R. 24.103. With regard to the second half of the definition contained in the order, INS does not have its own board of contract appeals. (The Department of Transportation and the General Services Administration Boards of Contract Appeals do hear certain appeals involving INS).

Thus, barring a reversal of Ardestani by the Supreme Court, INS does not conduct either type of proceeding for which the DOJ Order requires the reporting of EAJA fees, and therefore has nothing to report. The Order indicates by the following language that there is no requirement for components to submit negative reports: "The failure to submit a re-

port for a current reporting period shall be interpreted to mean that reportable activity has not occurred in the organization during the period." DOJ Order 2110.45 at 6.b.(3).

We conclude, therefore, that INS need not submit any report pursuant to DOJ Order 2110.45. If you have any further questions on this matter, please contact Douglas S. Wood, Deputy Associate General Counsel, at 514-1260.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-83

Legal Opinion Impact of the Refugee Act of 1980 on INS No. 1347-91 - Fees for Certain Asylee/Refugee Applications

Gene McNary, Commissioner

December 4, 1991

I. QUESTION

Does the Refugee Act of 1980, including the provisions relating to the United States Coordinator for Refugee Affairs, preclude the Attorney General from promulgating a regulation to impose fees for processing certain applications made by refugees and asylees?

II. SUMMARY CONCLUSION

The Refugee Act of 1980 and the 1951 United Nations Convention relating to the Status of Refugees do not preclude the Attorney General from promulgating a regulation to impose fees for processing certain applications made by refugees and asylees.

III. ANALYSIS

The proposed regulation would: impose a fee for processing certain asylee/refugee applications, the Refugee/Asylee Relative Petition (Form I-730), the Application for Status as Permanent Resident (Form I-485), and renewal of Application for Employment Authorization (Form I-765); clarify the jurisdiction of the Asylum Officers to adjudicate certain asylum applications; and clarify where applications for employment authorization should be filed. The proposed regulation does not address the issue of an alien's eligibility for asylum and is consistent with the United States refugee protection policy.

The definition of "refugee" under current law is drawn from two treaties that are fundamental to the efforts of the United States to protect refugees. These treaties are the 1951 United Nations Convention relating to the Status of Refugees (1951 Convention) and the 1967 United Nations Protocol Relating to the Status of Refugees (1967 Protocol). The United States is not a signatory to the 1951 Convention. The United States has, however, acceded to the 1967 Protocol. The 1967 Protocol incorporates much of the 1951 Convention, and broadens the definition of "refugee" to include individuals who fear persecution because of events occurring after 1951. After receiving the Senate's advice and consent, the President ratified the 1967 Protocol and it came into force for the United States in 1968.

The 1951 Convention contains three types of provisions, those defining who is a refugee, those prescribing the legal status of refugees, and those dealing with the administrative and diplomatic implementation of the Convention. There are

only two provisions that discuss the charging of fees to refugees. One provision is contained in Article 28, Travel documents, and provides that the Signatory States shall provide travel documents to refugees in their territory. The relevant provision provides that fees charged for travel documents shall not exceed "the lowest scale of charges for national passports." United Nations Convention Relating to the Status of Refugees, Opened for signature July 28, 1951, Schedule, para. 3, 19 U.S.T. 6259, 6282 [hereinafter 1951 Convention]. The other provision is contained in Article 29, Fiscal charges, and provides that taxes shall be imposed on refugees in the same manner as on nationals of the Signatory States. 1951 Convention, supra, art. 29, 19 U.S.T. at 6274.

Paragraph 1 of Article 17 of the 1951 Convention is the only section that is relevant to the proposed regulations. This section in pertinent part states:

> 1. The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

1951 Convention, supra, art. 17, para. 1, 19 U.S.T. at 6269.

The proposed regulation to charge a fee to asylum applicants for renewals of employment authorization is consistent with this provision, since all other aliens applying for employment authorization are required to pay fees. 8 C.F.R. 274a.13.

The Refugee Act of 1980 did not provide a method for adjudicating claims for asylum or withholding of deportation, but rather directed the Attorney General to establish the necessary procedures for such adjudication. Following the enactment of this Act, the Attorney General promulgated interim rules for the adjudication of asylum claims. The Attorney General may now grant asylum to an alien from any country in the world, if the alien can show that he or she is a refugee. The Refugee Act also amended 243(h) to remove the Attorney General's discretion to deny withholding of deportation to an alien who qualifies for this relief. On July 18, 1990, the Attorney General signed a comprehensive revision of the United States asylum regulations. These regulations were published in the Federal Register on July 27, 1990, and became effective October 1, 1990.

Title III of the Refugee Act establishes a United States Coordinator for Refugee Affairs to coordinate the overall United States admission and refugee resettlement policy. The proposed regulation has no impact on the refugee policy functions of the Coordinator.

In conclusion, this Office finds nothing in the 1951 Convention or in the Refugee Act of 1980 to preclude the Service from promulgating a regulation to impose fees for processing applications filed by refugees and asylees, provided that the proposed fees do not result in less favorable treatment for these applicants than for other similarly situated foreign nationals.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-84

Opinion: Airline liability for returning residents

Luis R. del Rio, Director, Office of International Affairs and Outreach

December 12, 1991

I. QUESTION

You have raised the question whether an airline may escape liability under Section 273(b) of the Immigration and Nationality Act (Act) by requiring a lawful permanent resident with an expired I-551 to sign a declaration that he has not been absent from the United States for over one year.

II. CONCLUSION

With limited exceptions, the bringing to the United States of an alien who does not meet the requirements of Section 273 incurs liability. An airline may not escape liability by seeking a declaration from any alien that visa requirements have been met.

III. BACKGROUND AND ANALYSIS

Under Section 273(a) of the Act, 8 U.S.C. 1323(a), it is unlawful for any person, including any transportation company, to bring to the United States any alien who does not have a valid passport and an unexpired visa, if a visa was required "under this chapter or regulations issued thereunder." Under Section 273(b) of the Act, a person or transportation company is subject to a fine for bringing in any alien who does not have a valid passport and an unexpired visa.

Under INS regulations at 8 C.F.R. 211.1(b)(1)(i)(A), a returning resident alien may present an I-551, alien registration receipt card in lieu of an immigrant visa if he or she is returning after a temporary absence abroad not exceeding one year. A permanent resident alien who has been abroad for more than one year may not enter with an I-551 and must obtain valid entry and travel documents. Such an alien may submit an application to the local United States consul for a returning resident's visa. See INA 101(a)(27)(A), 8 U.S.C. 1101(a)(27)(A); 22 C.F.R. 42.22. In the alternative, he or she may submit an application for a waiver of the documentary requirements (Form I-193) to the district director in charge of his intended port of entry. Id. 211(b), 8 U.S.C. 1181(b); 8 C.F.R. 211.1(a)(3) and 211.2. The Form I-193 would be necessary, in addition to the Form I-90, because the alien has been abroad for more than one year. 8 C.F.R. 211.1(a)(3). If the district director were to grant this waiver, then the consul could issue a "transportation letter" to facilitate the alien's return to the United States.

A transportation company must insure that a returning permanent resident fulfills the visa requirements described above to avoid liability under Section 273(b). The requirements of Section 273 are imposed without regard to the intentions of the transportation company. Matter of M/V "Emma", 18 I&N 40, 41 (BIA 1981). The carrier becomes, in effect, an insurer that its alien passengers have met the visa requirements of the Act. Id. Liability for fines under Section 273(a) of the Act is determined as of the time the alien is brought to the United States, and it does not matter whether the alien is subsequently admitted to the United States. Matter of M/V "Runaway", 18 I&N 127, 131 (BIA 1982).

Section 273(c) of the Act, permits remission (forgiveness in full) in one circumstance: where it appears that prior to the alien's departure from the last port outside the United States, the transportation company did not know, and could not have ascertained by the exercise of reasonable diligence, that the individual transported was an alien and that a visa was required. Such remission would be unavailable here, as the airline is proposing to escape liability by obtaining declarations from persons known to be aliens.[FN2]

The rule, then, is that, with limited exceptions, a transportation company is liable for fines under Section 273 for bringing in any alien, including a lawful permanent resident, who does not present a valid visa, as required by the Act or by INS' regulations. Accordingly, a transportation company may not escape such liability by requesting an alien to sign a declaration that he or she meets the statutory or regulatory requirements.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-85

Cuban Adjustment Act of 1966 Brief history

Gene McNary, Commissioner

CO 245-P

July 24, 1991

This memorandum outlines the history surrounding the Cuban Adjustment Act of 1966 ("1966 Act"), Pub. L. No. 89-732, 80 Stat. 1161 (1966). This information may be helpful in responding to questions about "special" treatment for Cubans, as compared with aliens of other nationalities.

As originally enacted, the INA classified immigrant aliens from Cuba (and other independent nations in the Western Hemisphere) as "nonquota immigrants." Immigration and Nationality Act of 1952, Pub. L. No. 82-414, Sec. 101(a)(27)(C), 66 Stat. 163, 169 (1952). As "nonquota immigrants," Cubans were not subject to the numerical limits placed on immigration. See id. Sec. 201, 202 and 203, 66 Stat. at 175–179. Spouses and children of United States citizens, however, were the only nonquota immigrants who were eligible for adjustment of status. Id. Sec. 245(a), 66 Stat. at 217. In 1958, Congress amended Section 245 to extend eligibility for adjustment to some aliens from the Western Hemisphere. Act of August 21, 1958, Pub. L. No. 85-700, Sec. 1, 72 Stat. 699 (1958) adding INA Sec. 245(c). Aliens from Canada, Mexico, and "adjacent islands," however, remained ineligible. Id. Since Cuba is an "adjacent island," INA Sec. 101(b)(5), 8 U.S.C. Sec. 1101(b)(5), Cubans remained ineligible for adjustment. In 1965, Congress again rendered ineligible for adjustment all aliens from the Western Hemisphere, including those from "adjacent islands." Act of October 3, 1965, Pub. L. No. 89-236, Sec. 13(c), 79 Stat. 911, 919 (1965).

Following the ascendancy of the Castro regime, the United States received several large influxes of Cubans. H. Rep. No. 1978, 89th Cong. 2d Sess. (1966) reprinted at 1966 United States Code Congressional and Administrative Service 3792, 3793–4. As noted, there was no limit on the number of Cubans who could immigrate in any given year. The Attorney General, however, did not have authority to adjust these aliens to permanent residence. The closing of the United States consulate in Cuba effectively precluded these aliens from obtaining their immigrant visas in Cuba. Silva v. Bell, 605 F.2d 979, 981 (7th Cir. 1979). The consular staffs in Canada and Mexico, however, were unable to process visa applications for the large number of Cuban immigrants. Id. Congress enacted the 1966 Act to ease the financial burden regular visa processing would have imposed on the Government and to facilitate the resettlement of the Cubans.

The eligibility requirements under Section 1 of the 1966 Act are few. The alien must be a native or citizen of Cuba who was inspected and admitted or paroled into the United States after January 1, 1959. 1966 Act, Sec. 1, 80 Stat. at 1161.[FN1] The alien must apply for adjustment, and must be eligible for admission as an immigrant. Id.[FN2] The alien must have been physically present in the United States for at least one year. Id., as amended by Refugee Act of 1980, Pub. L. No. 96-212, Sec. 203(i), 94 Stat. 102, 108 (1980). If the alien's status is adjusted, the alien is considered to be a permanent resident "as of a date thirty months prior to the filing of [the alien's] application or the date of his last arrival into the United States, whichever date is later." 1966 Act, Sec. 1, 80 Stat. at 1161.

A Cuban need not be a "refugee," as that term is defined by law, in order to qualify for permanent residence under the 1966 Act. Matter of Masson, 12 I&N Dec. 699 (BIA 1968). This aspect of the law is the source of the allegedly disparate treatment accorded Haitians, for example, as compared to Cubans. Many Haitians can obtain lawful status only if they qualify as "refugees" in the legal sense of this term. Under the 1966 Act, whether an alien from Cuba is a "refugee"

is wholly irrelevant to the alien's eligibility for adjustment.

As noted, when the 1966 Act was enacted Cubans were nonquota immigrants exempt from numerical limitations. Effective July 1, 1968, however, Congress imposed a limit of 120,000 on the number of aliens who could immigrate from the Western Hemisphere. Act of October 3, 1965, supra, Sec. 21(e), 79 Stat. at 921. The enactment of this limit was conditioned on the failure of Congress to enact other legislation which would have addressed the issue of Western Hemisphere immigration. Id. The limit of 120,000 Western Hemisphere immigrant visas became effective when Congress did not enact any other legislation on the issue before July 1, 1968. Id.[FN3]

The 1966 Act does not address the relation between adjustment under Section 1 and the numerical limits imposed by Section 21(e) of the 1965 Act. 80 Stat. at 1161. The Service initially took the position that adjustments under the 1966 Act were chargeable against the 120,000 Western Hemisphere visa numbers. Silva, 605 F.2d at 981. In 1976, the Assistant Attorney General, Office of Legal Counsel, concluded that this interpretation of the relationship between the 1965 and 1966 Acts was incorrect. Id. OLC determined that adjustments under the 1966 Act "'are not to be counted against the Western Hemisphere quota.'" Id. The Attorney General directed the Service on August 31, 1976, to conform its policy to the OLC opinion. Id. The Service ceased charging Cuban adjustments against the Western Hemisphere quota on October 1, 1976. Id. By then, 144,999 Western Hemisphere numbers had been used for Cuban adjustments. Id. Absent the incorrect interpretation of the law, these numbers would have been available to other Western Hemisphere natives. Id. at 983–4. The court of appeals enjoined the Service to adopt a complex procedure to "recapture" these visa numbers. Id. at 985–90.[FN4]

In 1976, Congress amended Section 245 to abolish the bar against granting adjustment of status to Cubans and other aliens from the Western Hemisphere. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, Sec. 6, 90 Stat. 2703, 2704–5 (1976). The 1976 legislation also amended the 1966 Act by adding a new Section 5, which provides:

> 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 [i.e., the 1966] 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.

Id., Sec. 8, 90 Stat. at 2706–7. The 1976 Amendments became effective "on the first day of the first month which begins more than sixty days after the date of enactment … ." Id., Sec. 10, 90 Stat. at 2707. Since the President approved the legislation October 20, 1976, 90 Stat at 2707, the amendments became effective January 1, 1977. The Service has continued to maintain that adjustments under the 1966 Act are not subject to numerical limits, even for aliens who arrived in the United States after January 1, 1977. Federation for Amer. Imm. Ref. v. Meese, 643 F.Supp. 983, 987 (S.D.Fla. 1986). The Federation for American Immigration Reform (FAIR) challenged this policy, arguing that Cubans arriving after January 1, 1977, should be subject to numerical limits. Id. Although the court held that FAIR lacked standing to challenge our policy, Id. at 985–7, the court, in dicta, approved our construction of the 1976 amendment. The court based this approval on its conclusion that Congress did not intend to repeal the 1966 Act, and that adopting FAIR's argument would result in an implicit repeal. Id. The court found that Congress was fully aware of the administrative practice of adjusting Cubans under the 1966 Act without regard to numerical limits. Id. at 989. The court considered the 1980 amendment, Refugee Act Sec. 203(i), supra, which reduced the period of residence required for adjustment under the 1966 Act, but left the 1966 otherwise intact, as an indication that Congress had acquiesced in the continued exemption of 1966 Act adjustments from the numerical limits on immigration. 643 F.Supp. at 989.

/s/ GROVER JOSEPH REES III
General Counsel

Genco Opinion 91-85

Subject: Legal Opinion: Payment of Relocation Expenses for Persons Selected Pursuant to Vacancy Announcements Issued Under Merit Staffing Plan II

From: Office or the General Counsel

CO 807-P

December 4, 1991

To G. H. Kleinknecht, Associate Commissioner, Enforcement

I. ISSUE PRESENTED

1. Is the Immigration And Naturalization Service (INS) obligated to reimburse Robert H. Reed for the relocation expenses he incurred in connection with his transfer from Headquarters to Westminster, California, after being selected for a Supervisory Criminal Investigator position announced in MSPII-91-WSM-046, dated March 15, 1991?

2. Assuming an affirmative response to Question 1 above, is INS obligated to reimburse all persons selected for positions announced in similar vacancy announcements for their relocation expenses?

II. SUMMARY CONCLUSION

1. Yes. In the case of Mr. Reed, INS complied with the requirement in the Merit Staffing Plan II (MSPII) to include "[a] statement [in all non-bargaining unit vacancy announcements] as to whether reimbursement for relocation expenses is authorized," and stated that such reimbursement was authorized. It subsequently attempted to reverse that statement. At some point, however, it cited a lack of funds as the reason for not authorizing such reimbursement. Thus, as explained below, it has waived the ability to withhold reimbursement under these specific facts.

2. No. INS is not obligated to reimburse any person for their relocation expenses associated with a non-bargaining unit position provided it (1) complied with the requirement in MSPII set forth above, and (2) relied on a valid reason in making the determination not to reimburse the selectee under the specific vacancy announcement for his or her relocation expenses. We do, however, have reservations as to whether the Comptroller General would uphold the INS position on any cases appealed to him, and are therefore requesting that the Executive Associate Commissioner for Management revise MSPII to meet the requirements of the relevant DOJ order and Comptroller General Decisions.

III. FACTS

On March 15, 1991, INS Western Region issued a vacancy announcement (MSPII-91-WSM-046) for a Supervisory Criminal Investigator, GM-1811-14, position in Westminster, California. This announcement stated that (1) the application period closed on March 29, 1991, and (2) reimbursement for relocation expenses was authorized. On April 19, 1991, INS amended the announcement for this position to set an opening date of April 12, 1991, and a closing one of April 26. It also stated that reimbursement for relocation expenses was not authorized.

Mr. Reed, who was stationed at Headquarters, applied for the position under the initial announcement. He was among the group selected to be interviewed. In the course of that interview the interviewer informed him that INS had amended the vacancy announcement and that reimbursement for relocation expenses was not authorized. It appears that at some point a person or persons informed Mr. Reed that the reason for the decision not to authorize reimbursement was

a lack of funds. INS ultimately selected Mr. Reed for the position, and he in turn accepted their offer.

He reported to his new duty station sometime prior to September 5, 1991, and by a memorandum of that date to J. T. Watson, Jr., he requested reimbursement for his relocation expenses. By memorandum dated September 11, 1991, John Brechtel, Assistant District Director, Investigations, Los Angeles District, endorsed this request. Mr. Watson denied Mr. Reed's request by memorandum dated October 3, 1991. Mr. Reed then appealed his denial, and by memorandum dated October 8, 1991, Edwin Fost, Deputy Comptroller, stated his conclusion that INS was obligated by recent decisions of the Comptroller General to reimburse Mr. Reed for his relocation expenses.

IV. DISCUSSION

The Comptroller General has explained the question on an employee's entitlement to reimbursement for relocation expenses as follows:

> Reimbursement of travel and relocation expenses upon an employee's change of station under 5 U.S.C. §§ 5724 and 5724(a) (1976) is conditioned upon a determination by the head of the agency concerned or his designee that the transfer is in the interest of the Government and is not primarily for the convenience or benefit of the employee or at his request.

Eugene R. Platt, 59 Comp. Gen. 699, 700–01 (1980) (Platt I).

This test is much easier to state, however, than it is to apply. Of particular relevance here is the Comptroller General's statement that generally a transfer is in the interest of the Government when "the agency recruits or requests an employee to transfer to a different location … ." if Dante P. Fontanella, B-184251 (July 30, 1975), quoted in Platt I, supra, 59 Comp. Gen. at 701.

The facts in Platt I are similar to those in Mr. Reed's case in that both individuals accepted a new position with the understanding that they would not receive reimbursement for their relocation expenses but subsequently sought reimbursement despite this understanding. In his decision, the Comptroller General discussed at length the principal issue affecting the questions you have raised; i.e., whether an agency can ever properly conclude that

> employees who relocate their permanent duty station pursuant to selection under the merit promotion program [were not being] transferred in the interests of the Government.

The Commission on Civil Rights bases its denial of reimbursement expenses to Mr. Platt on several grounds. The first is that he was not recruited nor requested to transfer by the Commission since it had merely issued a vacancy announcement and had no personal contact with him or any other person who submitted an application. The second ground asserted by the Commission is that Mr. Platt took the initiative in applying for a new job in a new city, accepted the job offer with the condition that there would be no reimbursement for relocation expenses, and therefore must be considered to have relocated for his own convenience. In the alternative the Commission states that Mr. Platt should be denied recovery as a matter of pure contract law principles since he has accepted the written offer of a position with knowledge that he would not be paid relocation expenses.

Id. at 702.

The Comptroller General went on to hold (reaffirming earlier decisions) that:

1. Contract law principles were irrelevant to the issue.
2. Budget constraints are not a legally sufficient basis for an agency's deciding not to reimburse an employee for relocation expenses when that relocation was in the interest of the Government.
3. "[W]hen an agency issues an announcement of an opening under its Merit Promotion Program … such action is a recruitment action … Thus the fact that an employee requests the position as a result of such announcement is not a

proper basis to conclude that the transfer is at the request of or primarily for the convenience of the employee." Id. at 703.

4. "Thus, on the record before us we find no appropriate basis for a determination by the agency that the transfer was at the request of or primarily for the convenience of the employee … . Absent some other basis than those heretofore advanced by the agency, our view is that the appropriate determination by the agency is that the transfer was in the interest of the Government." Id. at 703–04.

It is important to note that the Comptroller General did not say expressly in Platt I that a relocation resulting from an employee's application in response to an announcement under a Merit Promotion Program was always in the interest of the Government. Since, inter alia, the decision could be read as requiring that result, however, the Commission on Civil Rights requested the Comptroller General to reconsider it. The result was Eugene R. Platt, 61 Comp. Gen. 156 (1981) (Platt II). In its request for reconsideration the Commission urged:

> that Platt [l] be modified to allow the Government to consider all of the relevant factors involved in employee selection, including budget constraints, labor market conditions, and grade and skill level of the applicants in determining whether the selection of an individual is, in fact, in the best interest of the Government for purpose of paying relocation costs.

Id. at 158.

In the course of conducting the requested reconsideration, the Comptroller General solicited the views of the Office of Personnel Management and of the General Services Administration. After considering their views, he concluded that:

> some misunderstanding exists with regard to our prior Platt decision. While we addressed the matter of merit promotion transfers in the absence of agency regulations in Platt[I], we did not deal with the question of how agencies may effectuate a policy of not authorizing reimbursement of relocation expenses pursuant to a merit promotion announcement when the totality of circumstances leads the agency to determine that any resulting transfer is not primarily in the interest of the Government … .
>
> Absent an agency policy to the contrary, our view, as stated in Platt [I], is that when an agency issues an announcement of an opening under its Merit Promotion Program, such action is a recruitment action [and thus is in the interest of the Government and requires reimbursement for relocation expenses.]

We are not aware, however, of any statute or regulation which would prohibit the General Services Administration, Office of Personnel Management, or the employing agency from issuing regulations concerning relocation expenses and merit promotions which would provide guidance as to the conditions and factors to be considered in determining whether a particular transfer pursuant to a vacancy announcement would be in the interest of the Government for purposes of the reimbursement of relocation expenses.

Any regulation should state the specific conditions and factors which would be considered in making the determination in any particular case. These might include, but are not limited to, labor market conditions and cost effectiveness. Additionally, any regulations issued in accordance with the guidance given above should require that such information be clearly communicated in advance and in writing to all applicants, preferably by a statement on the vacancy announcement. If this is done, each person who applies will do so with an understanding of the conditions under which relocation expenses will or will not be paid, and acceptance of an offer would be tantamount to accepting a condition of employment which the person could not successfully contest unless it was shown to be arbitrary or capricious, or contrary to the decisions of this Office.

The Department of Justice has incorporated the principles of Platt II into DOJ ORDER 1335.1B, dated September 7, 1983, and entitled Department Merit Promotion Guidelines. In Subparagraph c. of Paragraph 9. (Contents of Plans) the Order discusses the payment of relocation expenses:

The conditions/circumstances under which relocation expenses incident to merit promotion/staffing actions will be paid must be addressed insofar as feasible in bureau level plans, and must be applied uniformly and consistently in accordance with applicable travel regulations, laws, and Comptroller General (CG) decisions. In this respect, the CG has ruled (B-198761, December 23, 1981) [Platt II] that:

(1) Absent agency (in this instance, bureau level) regulations to the contrary, a selection made as a result of merit promotion program recruitment/advertising would normally be viewed as being in the interest of the Government thereby creating an entitlement to relocation expenses, and;

(2) Budget constraints alone do not justify the denial of relocation expenses in transfers in the interest of the Government.

However, CG decisions do not preclude the employing organization from issuing regulations on relocation expenses and merit staffing/promotion actions stating conditions and factors to be considered in determining whether a placement action is in the interest of the Government. Accordingly, any regulations should state the specific conditions and factors which would be considered in making the determination in any particular case. These might include, but are not limited to labor market conditions and cost-effectiveness. Additionally, any regulations issued in accordance with the above guidance must require that vacancy announcements contain advance information as to whether or not relocation expenses will be authorized in the event selection is made of a candidate who applies from outside the commuting area. In the absence of such information, it can be assumed that the selectee will be entitled to relocation expenses if otherwise eligible.

The INS regulations concerning merit promotion program recruitments for non-bargaining unit positions are contained in the MSPII, dated May 15, 1983, which is approximately four months prior to the date of DOJ ORDER 1335.1B. INS has not revised MSPII to reflect the provisions of the DOJ Order concerning relocation expenses quoted above. Subparagraph 2-3 K. of MSPII does state that "[a] statement as to whether reimbursement expense for relocation expenses is authorized" is to be included in merit staffing vacancy announcements. There is nothing in MSPII, however, which provides any guidance as to "the specific conditions and factors which would be considered in making the determination [whether or not to authorize reimbursement for relocation expenses] in any particular case." Thus, INS has complied with the plain-language requirements of DOJ ORDER 1335.1B that precede any determination to deny relocation expenses.

We discussed this concern with the General Counsel of the Justice Management Division and an attorney on her staff. Their view was that while it clearly would be better for INS to have set forth criteria for the guidance of managers in making decisions whether or not to authorize relocation expenses, its failure to do so was not fatal. They went on to express the view that any INS merit staffing action in which the vacancy announcement contained a clear statement that reimbursement for relocation expenses was not authorized was defensible unless the decision was shown to be arbitrary or capricious, or in conflict with decisions of the Comptroller General (e.g., because it was made on the basis of budget constraints). Thus, we do not believe that INS is obligated to reimburse all persons selected for positions announced in similar vacancy announcements for their relocation expenses.

There is no defensible basis, however, for not authorizing reimbursement for Mr. Reed. He applied for his current position in response to a vacancy announcement which stated that reimbursement for relocation expenses was authorized. It is extremely doubtful that we could successfully argue that the amendment of this announcement after the closing date and the statements made to Mr. Reed at his interview that reimbursement was not authorized justified not reimbursing him. This issue is moot, however, because of the agency's reliance on budget constraints as the reason for the decision not to reimburse the selectee for this position. Both the Comptroller General's decisions and the DOJ Order prohibit basing decisions not to authorize reimbursement on this factor. Thus INS must reimburse Mr. Reed for his relocation expenses incurred in relocating from Headquarters to Westminster, California.

V. CONCLUSION

1. INS must reimburse Robert Reed for the relocation expenses he incurred in moving from Headquarters to Westminster, California, but need not reimburse other persons selected for positions announced in similar vacancy announcements so long as it complied with the requirements discussed above.

2. INS need not reimburse persons who relocated in response to a vacancy announcement which stated that reimbursement for relocation expense was not authorized unless directed to do so by the Comptroller General.

/s/ GROVER JOSEPH REES III
General Counsel

[FN1] "The term 'American vessel' means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if such vessel is owned by, chartered to, or otherwise control led by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State." 18 U.S.C. 1081. Under this definition, the Southern Elegance would be considered an American vessel.

[FN2] See INA 212(a)(12), 8 U.S.C. 1182 (a)(12) (excluding from admission aliens coming to the United States to engage in commercialized vice). Under the revised grounds of exclusion effective June 1, 1991, admission may be denied to any alien seeking admission to the United States to engage solely, principally, or incidentally in any unlawful commercialized vice. See Immigration Act of 1990, Pub. L. No. 101-649, 601, 104 Stat. 4973 (1990)

[FN3] See General Counsel's Opinion: Daily Cruises to Nowhere on the Mistral II, June 21, 1989 (concluding that no departure from the United States is made unless an entry is made into the sovereign territory of a foreign nation). In order for the Southern Elegance to make a departure every 29 days, the vessel may not merely sail into Mexican territorial waters. Instead, it must sail to a Mexican port or place and make an actual entry. General Counsel's Opinion, supra at p. 2.

[FN4] See General Counsel's Opinion, supra note 3.

[FN5] See supra pp 3–4 for a discussion of employment of USCs, LPRs, and other aliens on board gambling ships.

[FN1] In at least one case, aliens were taken into Service custody without relieving the carrier of liability for the costs of detention. See INS Telegraphic Message, CO 235-C, "JFK Stowaway Custody Issue," dated May 18, 1990 (May 1990 Wire) (ordering the transfer of six aliens from carriers to INS custody).

[FN2] See General Counsel's Opinions 1985–1986, "Status of Alien Detention Costs - Carrier Custody" at 294, December 11, 1986 (concluding that despite the establishment of the user fee, carriers remain liable for detention and deportation expenses under sections 237 and 273 of the INA). Like in the case of stowaways, carriers remain liable for the detention and deportation expenses of aliens who transit without a visa (TWOVs). See 54 Fed. Reg. 100, 101 (January 4, 1989). The Supplemental information in note 4 appearing in the Federal Register notice explains that carriers remain liable for the detention expenses of TWOV passengers pursuant to contracts entered into under Section 238 of the INA. Section 238 of the INA was also unaffected by the user fee provisions.

[FN1] The conviction record would be received via electronic mail; the court clerk would transmit the document on restricted access equipment.

[FN2] For example, it is well settled that hearsay is admissible in administrative proceedings, and can constitute substantial evidence upon which a decision may be based. See Richardson v. Perales, 402 U.S. 389 (1971); Calhoun v. Bailer, 626 F.2d 145, 148–49 (9th Cir. 1980, cert. den. 452 U.S. 906 (1981).

[FN3] It should be noted that failure to properly certify a conviction record will not necessarily prevent its admission into evidence where the criminal activity has been admitted. Matter of Bader, Interim Decision #2825 (BIA 1980).

[FN1] Section 1607 pertains to counterclaims brought by a foreign state or in which a foreign state intervenes. This exception is not relevant to actions involving employer sanctions proceedings and, therefore, will be not be discussed in this memorandum.

[FN1] An alien is "seized", i.e., taken into custody, "only when there is government termination of movement through means intentionally applied".

Brower v. County of Invo, 109 S.Ct. 1379 (1989). Therefore, aliens injured in automobile accidents while fleeing from Border Patrol Agents are not in the custody of those Border Patrol Agents unless it can be established that the Agents intended the accident to occur. An accident can be "intended to occur" if a roadblock is established blocking both lanes of a highway. Brower at 1382.

[FN2] City of ElCentro v. U.S., — F.2d — (9th Cir. 1991), reversing 16 Cl.Ct. 500 (1989).

[FN1] The facts related are based on information provided by the following correspondence (copies attached) pertaining to this case: Letter dated September 6, 1990 from Attorney for Local 1969 regarding a request for an opinion from the Regional Counsel; Letter dated October 4, 1990 from Attorney for Local 1969 regarding a request for an opinion from the Regional Counsel; and Letter dated October 24, 1990 from Attorney for the Employers regarding "Alien Crewmen" Status Inquiry.

[FN2] We have not been able to confirm this assertion.

[FN3] New Section 258(b)(3) apparently, will allow alien crewmen to perform the line handling function when they serve on board vessels that are covered by the terms of collective bargaining agreements which designate line handling as a crewman function. IMMACT 90 203(a)(1), P.L. No. 101-649, 104 Stat. 4973 (1990). That section provides that, "[n]othing in this section shall be construed as broadening, limiting, or otherwise modifying the meaning or scope of longshore work for purposes of any other law, collective bargaining agreement, or international agreement." Id. Agreements negotiated after the effective date of new Section 258 will be subject to the language of that section.

[FN1] It may be noted that the H nonimmigrant provision was amended prior to IMMACT by the Nursing Relief Act of 1989 (INRA), Public Law 101-238. Under the INRA, an H-1A category was established for nurses, and H-1B was designated for other temporary workers of distinguished merit and ability.

[FN2] On September 17, 1982, this Office issued an opinion supporting the use of OI 214.2b on the basis that "the Service has recognized that where H-1 aliens are concerned, labor market considerations are not relative to admissibility." The IMMACT provisions have now imposed labor market considerations on the admission of H-l

aliens and the OI is no longer Supportable on that basis.

[FN1] It may be noted that the H nonimmigrant provision was amended prior to IMMACT by the Nursing Relief Act of 1989 (INRA), Public Law 101-238. Under the INRA, an H-1A category was established for nurses, and H-1B was designated for other temporary workers of distinguished merit and ability.

[FN1] 28 CFR 45.735.

[FN2] 28 CFR 45.735-10.

[FN4] His Registration for Classification as Conditional Entrant shows his wife's nationality, like his own, as "ex-USSR," not "U.S.A." Items 3 and 10.

[FN5] This may be an error, since —, the son — listed on his Registration for Classification as Conditional Entrant in 1978, would be 17 now.

[FN1] The text of tee 1990 Act has two subsections 544(c). 104 Stat. at 5061. The effective date is in the second subsection 544(c).

[FN1] The cases also involved whether Section 405 of the 1952 Act, a "savings clause," continued in effect a "statute of limitations" against deportation proceedings that Congress did not include in the 1952 Act. The 1990 Act does not present this issue.

[FN1] The alien spouse filed her application for permanent residence (Form I-485) concurrently.

[FN2] Leano was decided after the Board's decision in Varela.

[FN3] Since the Service rejected the filing of the petition, there was no decision denying the petition, and arguably, no right to appeal. See 8 C.F.R. 3.1(b)(5), 204.1(a)(4).

[FN4] It is true that the Supreme Court has not held categorically that the principles of estoppel may never be invoked against the Government. Office of Personnel Management v. Richmond, 110 S.Ct. 2465, 2471 (1990). Nevertheless, the Court has rejected every claim of estoppel against the Government that has come before it. Id. at 2470.

[FN1] The exclusion ground applies for 20 years in the case of an alien convicted of an aggravated felony. INA 212(a)(6)(B), 8 U.S.C. 1182(a)(6)(B). A felony conviction, however, renders an alien ineligible for TPS. Id. 244A(c)(2)(B) (i), 8 U.S.C. 1254a(c)(2)(B)(i)

[FN2] A grant of TPS does not vitiate the lawful status of an alien who has been lawfully admitted as a nonimmigrant. See INA 244A(a)(5) and (f)(4), 8 U.S.C. 1254a(a)(5) and (f)(4). It is theoretically possible, therefore, that some TPS aliens (e.g., those with multiple entry nonimmigrant visas) may be able to obtain admission, rather than just parole, on returning from abroad. In practice, it is more likely that parole will prove to be the only alternative under which most TPS aliens will be able to return to the United States.

[FN1] The provisions specifically applicable to INS is found in 103 Stat. 999. In addition, Fiscal Year 1991 is covered by Continuing Appropriation, 1991, P.L. 101-403, 104 Stat. 867 (1990). The language for Fiscal Year 1991 is a continuing appropriation and, therefore, the language of the Fiscal Year 1990 appropriation is still in

effect.

[FN3] We consulted Ms. Susan Franklin, INS Fleet Manager and Ms. Debbie Washington, Budget Analyst for fleet operations on this point.

[FN1] CG File: B-239511 Date: December 31, 1990 Matter of: Reimbursement of Selective Service Employee for Payment of Fine.

[FN2] D.C. Code Sec. 40-624(b) provides that "The lessor of a vehicle shall not be liable for the fines or penalties imposed for an infraction pursuant to thus subchapter if:
(1) Prior to the infraction, the lessor has filed with the Bureau the license plate number and state of registration of the vehicle to which the notice of infraction was issued; and

(2) Within 30 days after receiving notice from the Bureau of the date and time of an infraction, as well as other information contained in the original notice of infraction, the lessor submits to the Bureau the correct name and address of the person to whom the vehicle identified in the notice of infraction was rented or leased at the time of the infraction and the lessor notifies such person by mail of the notice of infraction."

[FN3] "Under no circumstances will operators of Service vehicles be relieved of responsibility for moving or parking violations." INS Administrative Manual 3703.05.

[FN4] However, the head of any agency may decide to terminate collection activity if the cost of doing so will exceed recovery. 4 CFR 104.3(c). Where the collection activity is suspended under this regulation, other means of holding the employee responsible may be considered.

[FN1] Unless the Service approves a visa petition according the alien the status of an "immediate relative," the alien's unlawful status would create an additional bar to adjustment. See INA 245(c)(2), 8 U.S.C. 1255(c)(2).

[FN1] As amended by Section 7, Act of November 14, 1986, Pub. L. 99-653, 100 Stat. 3655, which repealed the former subparagraph (a) and renumbered the remaining subparagraphs accordingly. Present Section 238(c) was Section 238(d) before the amendment.

[FN2] In its only precedent decision regarding the applicability of a fine pursuant to Section 271(a) against a transportation line signatory to a Section 238 contract, the Board of Immigration Appeals observed in dictum, It does not necessarily follow that the carrier's signatory line status [the carrier in the case was signatory to a contract relating to TWOV's] exempted it from fine liability under Section 271(a) of the Act. The Cuban national passengers involved in this case were not TRWOV [TWOV] aliens. They were brought to the United States and presented for admission as returning refugees. Consequently, it is not apparent that any purpose would be served by allowing the carrier's signatory line status to exempt it from fine liability under Section 271(a) of the Act with regard to these aliens. On the other hand, the terms of that section appear to exempt categorically all transportation lines which may enter into a contract as provided in Section 238 of the Act. Matter of Iberia Airlines Flight #IB 951, 19 I&N Dec. 768 (BIA 1988). The question raised by the Board in Iberia Airlines is whether the exemption from fine under Section 271(a) for transportation lines signatory to a contract under Section 238 of the Act applies even when the violation is not related to the subject of the contract. The Board found it unnecessary to resolve this issue in the Iberia Airlines case because the line had not violated Section 271(a). We do not need to resolve the question because the violation in this case clearly relates to the subject matter of the contract,

namely, TWOV's.

[FN3] This provision of the contract does not provide for payment of liquidated damages for failure to prevent landing or for failure to present aliens for inspection.

[FN4] Special circumstances regarding crewmen, not relevant here, are also dealt with in this OI.

[FN1] The applicable provision is Section 101(f)(8) of the Immigration and Nationality Act prior to its amendment by Section 509 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978: "For the purposes of this Act—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was— … (8) one who at any time has been convicted of the crime of murder." (Emphasis supplied.) The Immigration Act of 1990 substituted the words "an aggravated felony (as defined in subsection (a) (43))" for the words "the crime of murder." The amended version is applicable to convictions occurring on or after November 29, 1990.

[FN2] If the Court of Appeals decision in the record is authentic, the description of the conviction by the Court of Appeals as "murder" in the pardon is incorrect.

[FN3] The ground of excludability was said to be: "Convicted on murder charge on 3/31/49 for which he was sentenced to an indeterminate sentence ranging from 10 years and one-day to 17 years and 4 months." As stated above, this conviction appears to have been appealed, and the sentence to have been modified to an indeterminate prison term of from 10 years and one day to 12 years and one day and payment of an indemnity of P6,000.00. The file contains no application, supporting documentation, or written explanation of the reasoning underlying the grant of the waiver, although a letter dated June 17, 1983, from the Acting Officer in Charge Manila to the alien refers to an application for a Section 212(h) waiver. The file does contain an unauthenticated signed certification from the station commander of police in Batac, Ilocos Norte, the Philippines, that the alien was convicted of murder in the court of first instance and was pardoned conditionally by President Garcia and then absolutely by President Marcos. It does not mention the appeal and modification of the conviction to homicide.

[FN4] The alien served honorably in active-duty status in the Philippine Army, including recognized guerrilla units, during World War II. However, to be naturalized under Section 405 of the Immigration Act of 1990, Act of November 29, 1990, Pub. L. 101-649, 104 Stat. 4978, he must nevertheless make the same showing of good moral character as is required under Section 316 of the Immigration and Nationality Act.

[FN5] For the purposes of this Act—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was … (3) a member of one or more of the classes of persons, whether excludable or not, described in paragraphs (2)(D), (6)(E), and (9)(A) of Section 212(a) of the Act; … if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period … ."

[FN6] This waiver was formerly found in Section 241(b).

[FN1] In a letter dated January 22, 1990, addressed to Ms. Toni Leane, Deputy Associate Commissioner for Retirement and Survivors Insurance, Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, this office concluded that a legend stating "valid for work only with INS authorization" constituted a "major change" but, after appropriate Congressional review, would be statutorily permissible. Nev-

ertheless, we suggested that the legend be modified to state that "this card does not authorize employment unless accompanied by INS authorization." On March 21, 1991, in an internal memo addressed to Edward J. Lynch, Special Assistant for Policy Development, this office reaffirmed that such a legend constituted a "major change," but also opined that the legend violated Section 535 of IMMACT 90, Section 274B(a)(6) of the Act, since it would impermissibly require the production of an INS-issued document. For the reasons stated at page 3, infra, this office now retreats from the latter conclusion.

[FN2] This act is Title IV of the Federal Employees Pay Comparability Act of 1990 (P.L. 101-509, 104 Stat. 1427 et seq.).

[FN3] Sections 8331(20) and 8401(17) of title 5, United States Code, define "law enforcement officer" under the Civil Service Retirement and Federal Employee Retirement Systems, respectively.

[FN4] We consulted with the Office of Legal Counsel of the Department of Justice in the course of preparing this opinion. This conclusion is consistent with the advice provided by that office.

[FN1] The only difference is the substitution of "during the marriage" for "after the marriage" in the provision relating to the waiver created for a battered spouse or child.

[FN2] Mere commencement of termination proceedings is not enough, of course, since the statute clearly requires that the marriage already be terminated. INA 216(c)(4)(B), 8 U.S.C. 1186a(c)(4)(B).

[FN1] Job Training Partnership Act of 1982, 29 U.S.C. 1691–1709 (1988).

[FN2] 29 U.S.C. 1691, 1693 (1988); See also 20 C.F.R. 684.1 and SENATE REP. No. 97-468, 97th Cong.,2nd Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2636, 2658.

[FN3] 20 C.F.R. 684.46(a) (1990).

[FN4] 20 C.F.R. 684.53(a) (1990).

[FN5] 20 C.F.R. 684.53(e) (1990).

[FN6] 20 C.F.R. 684.53(c) (1990).

[FN7] 29 U.S.C. 1706 (1988); 20 C.F.R. 684.35 (1990).

[FN8] 29 U.S.C. 1700 (1988); 20 C.F.R. 684.60–684.83 (1990).

[FN9] 29 U.S.C. 1706(a)(2) (1988); 20 C.F.R. 684.85 (1990).

[FN10] 29 U.S.C. 1706(a)(3) (1988); 20 C.F.R. 684.84 (1990).

[FN11] 20 C.F.R. 684.84(b), 684.85(g) (1990), respectively.

[FN1] Juvenile delinquency is defined by the Federal Juvenile Delinquency Act, 18 U.S.C. 5031, as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult."

[FN2] The courts have established a rule that a person or transportation company may raise the defense of duress to the imposition of Section 273(b) fines, in the limited circumstances of the Mariel Cuban boatlift See Pollgreen v. Morris, 571 F. Supp. 711 (1984); Pollgreen v. Norris, 770 F.2d 1536 (11th Cir. 1985). Such a defense would be inapplicable here.

[FN1] The Attorney General may also adjust the status of the alien's spouse and children, even if these aliens are not Cubans, so long as they reside in the United States with the Cuban. 1966 Act, Sec. 1, 80 Stat. at 1161.

[FN2] Unlike the legalization statutes, INA Sec. 210(c) and 245A(d), 8 U.S.C. Sec. 1160(c) and 1255a(d), and the special Cuban-Haitian adjustment statute, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, Sec. 202, 100 Stat. 3359, 3404 (1986), as amended by Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, Sec. 2(i), 102 Stat. 2609, 2612 (1988), the 1966 Act does not provide for any special waivers of excludability. 1966 Act, Sec. 1, 80 Stat. at 1161.

[FN3] In 1978, Congress merged the Eastern and Western Hemisphere limits on the number of immigrant visas into a single limit that applies worldwide. Act of October 5, 1978, Pub. L. No. 95-412, Sec. 1, 92 Stat. 907 (1978) as amended by Refugee Act of 1980, supra, Sec. 203(a), 94 Stat. at 106.

[FN4] The Supreme Court's decision in INS v. Pangilinan, 486 U.S. 875 (1988) that courts of equity lack authority to order the granting of immigration benefits to aliens who do not qualify under the strict requirements of the law casts some doubt on the authority of the Seventh Circuit to impose this injunction. Since all of the Silva numbers have long since been recaptured, however, see Silva v. Smith, No. 76-C-4268 (N.D.Ill. December 18, 1981), this issue is moot.

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