No. 96-36304
DC# CV-94-01204-JCC

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA WALTERS, et al.,
Plaintiffs/Appellees

v.

JANET RENO, et al.,
Defendants/Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLANTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANTS

STATEMENT OF JURISDICTION

The district court had jurisdiction under 8 U.S.C. § 1329 and 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291. Defendants appeal from the following orders: February 15, 1995 Order denying defendants' motion to dismiss; March 13, 1996 Order On Motions For Summary Judgment And For Class Certification; October 2, 1996 Order and Permanent Injunction; and December 11, 1996 Order On Motion to Amend and Motion for Stay.[1] A timely amended notice of appeal was filed December 17, 1996. Fed. R. App. P. 4(a)(4)(C).

[1] This brief refers to the parties as "plaintiffs" and "defendants." Fed. R. App. P. 28(d). "E.R." refers to the excerpts of record filed with this brief. "C.R." refers to the certified record in the district court.

STATEMENT OF THE ISSUES

1. Whether the district court erred in determining that the Constitution requires the Immigration and Naturalization Service ("INS"), in bringing document fraud charges under §274C of the Immigration and Nationality Act ("INA" or "the Act"), to use Spanish-language notice forms and amend the English-language forms which already explain how to contest the charge and set forth the possible penalty.

2. Whether the court erroneously granted summary judgment based on plaintiffs' theories rather than on the record evidence properly viewed in the light most favorable to defendants.

3. Whether the court erred in certifying a class where plaintiffs' factual situations varied such that class treatment violates the purpose of Fed. R. Civ. P. 23 and does not promote efficiency.

4. Whether under Lewis v. Casey, 116 S. Ct. 2174 (1996), the nationwide systemic injunction entered was too broad and burdensome, based on a finding of prejudice to only two named-plaintiffs.

5. Whether the court erred in denying summary judgment to defendants, by making erroneous legal conclusions and ignoring plaintiffs' failure to present any evidence on certain claims.

STATEMENT OF THE CASE

Plaintiffs allege that the INS violated their constitutional and statutory rights. Plaintiffs argue that they did not receive adequate notice of the nature and consequences of the charges filed against them under Section 274C of the INA. The district court certified a class, granted summary judgment for plaintiffs, and issued a permanent injunction against the INS. Defendants' motion for reconsideration under Fed. R. Civ. P. 59(e) was denied notwithstanding the impact of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), passed two days before the court's order was entered.

STATEMENT OF FACTS

This case concerns proceedings brought under 8 U.S.C. § 1324c, which makes it unlawful to knowingly forge any document, or to use or to possess any forged document, to satisfy a requirement of the INA, and imposes money penalties against violators. Villegas-Valenzuela v. INS, No. 95-70767, 1996 WL 729585, *1 (9th Cir. December 20, 1996); Remileh v. INS, 101 F.3d 66, 67 (8th Cir. 1996). The six named-plaintiffs are aliens who, under grants of immunity from criminal prosecution, confessed to purchasing and using fraudulent social security and alien registration cards to obtain employment in the United States. After being charged with civil document fraud, each plaintiff either waived his right to a document fraud hearing, or failed to make a timely request for a hearing. Plaintiffs then filed this lawsuit claiming that they failed to request hearings because they did not receive adequate notice of the nature and consequences of the 274C charges and the opportunity to request a hearing. Plaintiffs also claimed that the INS coerced them into waiving their right to request 274C hearings.

A. Statutory Scheme

When an alien or citizen is charged with document fraud, he is given a Notice of Intent to Fine form ("NIF"), explaining that he is being charged with civil document fraud, and informing him of the procedures for contesting the charges and requesting a hearing. E.R. 329-308; C.F.R. § 270.2(d). He is also given a separate Notice of Rights/Waiver form ("NOR/W"), advising of his rights, including the right to an attorney and to request a hearing before an administrative law judge ("ALJ") to contest the 274C charge. E.R. 331; see 8 U.S.C. § 1324c(d)(2). The individual has the opportunity to request a hearing within 60 days or to execute a waiver of the hearing. E.R. 331; 8 C.F.R. §§ 270.2(f), (g). If he executes a waiver or fails timely to request a hearing, a final 274C order issues. This order is unappealable and renders an alien deportable and inadmissible from the United States. 8 U.S.C. § 1324c(d)(2)(B). If a hearing is requested, the INS must file a complaint with an ALJ to adjudicate the fraud claim before a final order can issue.[2]

[2] If, in addition to the 274C charge, the INS believes an alien is deportable because, for example, he overstayed his visa, that person may also be given an Order to Show Cause ("OSC") which initiates deportation proceedings. The OSC explains the reasons the INS considers the person deportable and orders him to show cause, in a hearing before an immigration judge ("IJ"), why he should not be deported. If a document fraud final order has issued, rendering the alien deportable and excludable, that may serve as the basis for deportation in an OSC.

B. Procedural History

On October 17, 1994, defendants filed a motion to dismiss arguing that the NIF and NOR/W satisfy due process and fully inform the recipient of his rights and the nature and consequences of 274C charges. C.R. 6-8. The court denied this motion on February 15, 1995. E.R. 29-41.

After settlement discussions were unsuccessful, plaintiffs filed class certification and preliminary injunction motions on November 30, 1995, which defendants opposed. On March 13, 1996, the court denied preliminary injunctive relief but certified a nationwide class. E.R. 475.

Plaintiffs subsequently filed a motion for summary judgment which the court granted, in part. The court held that the NIF and NOR/W did not satisfy due process because they used "highly technical, legalistic" language, failed to adequately explain the possible consequences of a 274C final order, should explain that deportation is "automatic" once a 274C final order issues, and were written only in English. E.R. 481-88. Also, the court found it confusing that the NIF and NOR/W could be served on the same day as an OSC, since the OSC is, by statute, translated into Spanish. E.R. 485-86. The court also effectively denied defendants' summary judgment motion.

Despite its ruling that the NIF and NOR/W violate due process, however, the court did not hold that individual plaintiffs' due process rights were violated. In fact, the court stated that each alien could have "received constitutionally adequate notice despite having received the section 274C notice forms that the Court has found defective." E.R. 511.

The court denied plaintiffs' summary judgment motion insofar as it sought to prevent the INS from accepting waivers of 274C hearings in the future. E.R. 493-94. The court also expressed its intention to enter a permanent injunction directing the INS to revise the NIF and NOR/W, and ordered the parties to submit briefs addressing the form this injunction should take. E.R. 494.

On October 2, 1996, the court entered a permanent injunction ordering the INS to revise the NIF and NOR/W. The forms must be translated into Spanish and "plainly communicate the nature and consequences of the section 274C charges and the procedures for contesting them." E.R. 509. The INS must submit the revised 274C forms to plaintiffs' counsel and the district court at least 30 days prior to their use. This supervision lasts for one year, renewable upon plaintiffs' request. E.R. 514.

The court also enjoined the INS from issuing 274C final orders to aliens who received the "defective" NIF and NOR/W but who had not yet received final orders. Such final orders cannot be issued until the aliens are recharged with revised forms or the INS demonstrates before an ALJ that the aliens received constitutionally adequate notice despite receiving the "defective" forms. E.R. 508.

The court ordered the INS to mail notice of the ruling to class members who received final orders without hearings and to mount a large-scale publicity campaign. E.R. 509-10. The court enjoined the INS from deporting or "enforcing or taking any action in reliance" on final orders until class members are given an opportunity to file motions to reopen their final orders and also during the reopening process. E.R. 511.

As explained below, the court ordered a complex reopening process that would result in up to four individualized hearings for each alien who responds to the notice campaign. See section II.B. infra. The court also ordered that aliens be paroled into the United States to attend hearings, or that "alternative arrangements" be made. E.R. 512-13.

On October 17, 1996, the government filed a timely motion under Fed. R. Civ. P. 59(e), seeking reconsideration of the permanent injunction order in light of IIRIRA. The government argued that §306(a) of IIRIRA eliminates the district court's jurisdiction to order the INS to suspend the deportation of class members or to order their parole into the United States, and that §304, which eliminated the requirement that an OSC be translated into Spanish, counters the court's rationale for requiring that the 274C forms be translated into Spanish.[3] C.R. 154 at 3-4. Also, §345 of IIRIRA provides additional support for defendants' position that 274C forms should not be required to communicate, as the court ordered, that deportation follows "automatically"

[3] The court enjoined the INS from using 274C forms that are not in Spanish. According to the court, because OSC's are translated into Spanish, this leads individuals who receive both an OSC and 274C papers to believe that the latter are "inconsequential documents." E.R. 486.

from a 274C final order. Section 345 explicitly provides a waiver of exclusion and deportation grounds for certain 274C violators. Therefore, it is incorrect to say that deportation is automatic and certain when a final order issues.

The district court denied the motion for reconsideration on December 11, 1996, but granted a partial stay of the injunction pending appeal.[4] The court stayed the provisions of the injunction that require the INS to initiate a publicity and notice campaign and to parole or make other arrangements for aliens to reenter the United States to attend reopened 274C proceedings. E.R. 552-54. The provisions that prohibit the INS from deporting certain class members and using the current NIF and NOR/W were not stayed. E.R. 552-54.

SUMMARY OF ARGUMENT

The district court granted summary judgment to plaintiffs while ignoring genuine issues of material fact and without linking its factual findings to record evidence. The court's conclusion that due process requires Spanish translation and rewording of English-language 274C forms is contrary to law. The court improperly certified a class and ordered individualized hearings to be held in each case in violation of Fed. R. Civ. P. 23. Finally, the court impermissibly entered a nationwide

[4] The court modified the injunction such that the INS is no longer enjoined from deporting an alien on grounds other than 274C unless he is eligible for relief from deportation absent his 274C final order. E.R. 555, 557.

injunction in violation of the relevant law, including Lewis v. Casey, 116 S. Ct. 2174 (1996).

ARGUMENT

I. District Court Erroneously Entered Summary Judgment for Plaintiffs.

In evaluating plaintiffs' motion for summary judgment, the district court was required to view the evidence in the light most favorable to the government and properly apply the relevant law. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S. Ct. 1261 (1996). The court's role was to evaluate the evidence to determine whether disputed issues of material fact existed and not to resolve or ignore disputes. Anheuser-Busch v. Natural Beverage Distribs., 69 F.3d 337, 343 (9th Cir. 1995). On appeal, this Court reviews a grant of summary judgment de novo, construing evidence in the light most favorable to defendants and determining whether the district court correctly applied the law. Carlsbad, 58 F.3d at 441.

A. Factual Findings Based on Theory.

Virtual verbatim adoption of a party's findings of fact is suspect especially when the court's findings take the form of conclusory statements unsupported by citation to the record. See, e.g., United States v. El Paso Natural Gas, 376 U.S. 651, 656-57 (1964); Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472-73 (1982)(legal questions should be resolved in concrete factual context, not in the atmosphere of a public debating forum). In entering summary judgment, the district court failed to view the evidence in the light most favorable to defendants, improperly disregarded material factual disputes and failed to support its conclusions with citations to evidence.[5]

Addressing a central issue, the court concluded that plaintiffs were unlikely to understand the English-language 274C forms because, according to the court, it is "uncontestable that most respondents speak primarily or only Spanish." E.R. 488; 473; 483 (court stated that, while some aliens may understand some English, many do "not understand or speak English at all."); see also E.R. 550. The court cited no evidence to support these broad findings.

The court ignored conflicting evidence concerning plaintiffs' language abilities. Many 274C respondents speak English well, have a working knowledge of English, or worked and lived in the United States a significant length of time.[6] A fact-finder viewing this evidence in the light most favorable to

[5] The court's errors were foreshadowed during oral argument, when it criticized the parties' detailed statements of fact as "voluminous" and therefore "virtually worthless," although the case involves a purported nationwide class action with thousands of potential class members. E.R. 457.

[6] See E.R. 58-59, 60-63, 69, 365 (Walters able to read, understand, speak English); E.R. 253, 372 (Corona Alvarez could communicate fairly well in English); E.R. 203 (Meziab fluent in English); E.R. 381-82, 452 (Garcia-Soria studied English); E.R. 293, 321, 388 (Xochicale Mergel understood 30-40% English at the time of her processing); E.R. 323, 384-85 (Ramirez-Mendez could understand some English words); E.R. 313, 315-316, 386-87 (Perez-Huerta had one year of English instruction; speaks, reads English with his children).

defendants could not conclude that it is "uncontestable that most respondents speak primarily or only Spanish." E.R. 488.[7]

Also, the district court found that, "in most cases," the INS fails to provide Spanish translations of the aliens' rights. E.R. 466. Again, the district court cited no supporting evidence. Defendants submitted evidence that in many cases the INS provided written translations and the agents, who receive Spanish instruction and must show a working knowledge of Spanish to graduate from the training academy, provided oral explanations. E.R. 341-42, 344-45, 281, 454, 275, 278, 264-69, 407, 396. The district court failed to view this evidence in the light most favorable to defendants and, instead, merely accepted plaintiffs' theories.

The court erroneously found that aliens were unlikely to understand the consequences of not requesting a document fraud hearing because "a number of INS agents ... do not understand or cannot explain the immigration consequences of a final order." E.R. 466, 484. The court again failed to cite record evidence and ignored conflicting evidence presented by defendants suggesting that agents typically know consequences of 274C final orders. E.R. 351-56, 42-43, 45, 256, 74, 51, 356-57, 280, 455,

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[7] Defendants conceded that English is frequently not the plaintiffs' <u>native</u> language, but disputed that plaintiffs have limited or no understanding of English, and thus, could not understand the English-language forms. E.R. 347-48; <u>see</u> note 6, <u>supra</u>. The government also presented evidence showing that the demographics of the alien population in the United States are changing. <u>See</u>, <u>e.g.</u>, E.R. 516-19.

357-58, 239-40, 250-51, 78-82, 84-87, 66-67, 358-59, 319-20, 291, 297, 359-61, 404-05.

The conclusion that many agents do not understand the consequences of a final order apparently stems from the district court's misconception that the consequences of a final order are "permanent" and "automatic" deportation or exclusion. E.R. 484. As explained below, however, the possible collateral immigration consequences of 274C final orders cannot be known prior to the individual's deportation or exclusion hearing. C.R. 124 at 13-16. It would be improper for an INS agent to inform an alien that a final order results in "automatic" deportation. Also, there is no evidence that INS agents misinformed plaintiffs as to the immigration consequences of 274C final orders. See section I.B.2(a) infra.

The district court also found that the forms' inadequacy is "profoundly exacerbated when they are used contemporaneously with the deportation OSC" because the OSC is provided in both Spanish and English. E.R. 484. According to the court, providing the OSC in Spanish "leaves many aliens with the false impression that the [274C] forms, served in English only, are inconsequential documents." Id. at 486 (emphasis added). The district court cited no evidence supporting this hypothesis and plaintiffs did not produce witnesses who testified to having such an "impression" for that reason.

Also, evidence was presented that 274C forms are served on the same day as an OSC in only a minority of cases. E.R. 362-64, 304-05, 408-50. In those cases, the forms, as well as many agents, indicated that the procedures described on the 274C forms are unique to document fraud. E.R. 362-64, 307-08, 44, 46-47.[8]

Compounding its error, the court hypothesized that "an alien may check the box to request a hearing on the Request for Disposition served with the OSC in the mistaken belief that his hearing will also address the § 274C charges." E.R. 485. According to the court, "many members of the class believed, erroneously, that their request for a deportation hearing also applied to the document fraud charges." Id. No evidence was introduced of such a mistake. In fact, defendants' evidence disputed the claim that plaintiffs confused deportation and 274C proceedings, causing them to forsake their right to request a 274C hearing.[9] Again, the court ignored this genuine factual

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[8] Even in the minority of cases where deportation documents are served on the same day as 274C forms, there is no basis for a Spanish-speaking person who reads the forms to believe that the 274C forms are merely English translations of the Spanish-language OSC. The English translation of the OSC is written on the same page as the Spanish version. The two versions are written side-by-side on the same document. Thus, it is unreasonable for a Spanish-speaker who reads the OSC to believe that the 274C forms, not attached to the OSC, are merely English translations of the OSC.

[9] For example, named-plaintiffs Walters and Adames received Spanish-language NOR/W's, explaining how to request a 274C hearing and explaining that a final order has immigration consequences. E.R. 237-38, 226, 228. The INS agent explained Walters' rights to her in Spanish, and she understood him. E.R. 77-82, 84-87, 238-39, 250-51. Crúz-Garcia admitted that the agent explained the contents of the forms she received. E.R. 181-82. Adames did not read the forms, even though they were in Spanish "because I didn't think it would be important." E.R. 140-41. Concerning the NIF, she testified that, "[t]he truth is, I didn't even look at it. . . . I didn't look to see if it was in (continued...)

dispute and viewed the evidence in the light most favorable to plaintiffs.

Finally, the district court found that "many members of the class" failed to request 274C hearings, yet requested deportation hearings. According to the court, this showed that the aliens were inadequately apprised of their rights under 274C. The court hypothesized that an alien would not knowingly waive his right to a 274C hearing and also request a deportation hearing. E.R. 465-66. The court's speculation is misguided.

First, the court did not acknowledge the fact that an alien may request a hearing on a non-274C charge of deportability prior to being charged with document fraud. After the document fraud charge is made, an alien who has no defense to the charge may reasonably decide to waive his right to request a 274C hearing. See, e.g., C.R. 124 at 30. Second, the district court ignored the possibility that an alien could waive his right to request a 274C hearing in an attempt to expedite the case so that he could try to enter the United States again illegally, as some plaintiffs admitted they had or would. E.R. 375, 153-54, 310. Third, the evidence showed that most 274C respondents did not request a hearing on deportability. E.R. 362-64, 304-05, 408-450 (in only two-fifths of cases did they elect a deportation hearing). Thus, it is erroneous to make general conclusions

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[9](...continued)
Spanish or English." E.R. 133. Corona-Alvarez stated that he "didn't pay attention" to his Spanish advisals. E.R. 108. Meziab speaks and reads English. E.R. 203-04.

about 274C respondents based on a minority of cases. Faced with these competing inferences, the court was required to view the evidence in the light most favorable to the government. Instead, the court summarily resolved the issue in plaintiffs' favor.

The court improperly entered summary judgment based on the moving party's version of the facts and disregarded direct evidence showing that plaintiffs understood the nature and possible immigration consequences of the charges against them.[10] The grant of summary judgment to plaintiffs should be reversed.

B. Due Process Does Not Require Simplified English-Language

The district court held that the 274C forms violate due process because the forms are not written in Spanish, use "highly technical, legalistic" language, and do not convey the collateral immigration consequences of a 274C final order. E.R. 483, 488. This incorrect legal ruling is reviewed de novo. United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984).

1. Applicable Legal Standards

Notice and an opportunity to be heard must be provided of adverse government action. Kirk v. INS, 927 F.2d 1106, 1107 (9th Cir. 1991); Alaska Roughnecks & Drillers Assoc. v. NLRB, 555 F.2d

[10] For example, Meziab's spouse testified that when she read the 274C forms she was concerned that her husband signed them without consulting an attorney because the forms explained that an alien would be deportable and excludable. E.R. 208, 210-11. Walters testified that she understood the terms "deportable" and "excludable" to mean "[t]hat you have to leave the country." E.R. 66-67. The INS agent reviewed this paragraph with her. E.R. 85-86. Cruz-Garcia understood she could be deported. E.R. 182.

732, 735 (9th Cir. 1977). Due process is satisfied if notice is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13 (1978); E.E.O.C. v. Pan Am. World Airways, 897 F.2d 1499, 1507-1508 (9th Cir. 1990)("notice must be such that one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."). Actual notice is not required. Fuentes-Arqueta v. INS, 101 F.3d 867, 872 (2d Cir. 1996); Katzson Bros. v. EPA, 839 F.2d 1396, 1400 (10th Cir. 1988); Jordan v. Benefits Rev. Bd., 876 F.2d 1455, 1459 (11th Cir. 1989) ("The question is not whether a particular individual failed to understand the notice but whether the notice is reasonably calculated to apprise intended recipients, as a whole, of their rights.").

Where notice is reasonably calculated to inform, a person claiming not to understand "must take the next step to inquire and make his problem known." Id. (citing Soberal-Perez v. Heckler, 717 F.2d 36, 43 (2d Cir. 1983) (non-English speaking recipients of notice reasonably calculated to apprise of proceedings are charged with duty of further inquiry).

The INS should be accorded deference in determining what notice is appropriate under the circumstances:

> In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of . . . programs that the procedures they have provided assure fair consideration of the . . . [individual's] claims.

Mathews v. Eldridge, 424 U.S. 319, 349 (1976).

2. 274C Forms are Reasonably Calculated to Provide Sufficient Notice.

The district court erred in finding that due process requires simplified 274C forms. The challenged forms list the allegation(s), identify the statutory basis for the charge(s), and state the penalty sought. Both forms explain how to request 274C hearings. E.R. 329-31. The forms thus "satisfy the minimum requirements of due process." See, e.g., Landon v. Plasencia, 459 U.S. 21, 35 (1982); Villegas-Valenzuela, 1996 WL 729585 at *6 (in document fraud case, administrative complaint was sufficient which stated that individuals "knowingly used two fraudulent documents," "identified the documents . . . used, and cited the statutory provision violated"); Filiberti v. Merit Sys. Protect. Bd., 804 F.2d 1504, 1508 (9th Cir. 1986) (administrative complaint sufficient which gives notice of charges and lists the statutory violations).

The issue is not whether better 274C forms can be imagined, but whether the procedures satisfy due process. Due process does not mandate standards that assure perfect, error-free determinations. Walters v. National Assoc. Radiation Survivors, 473 U.S. 305, 320 (1985) (hereinafter "Survivors"). The forms give adequate notice of the opportunity to request a hearing and provide all the process that is due.

(a.) No Due Process Right To Notice of Collateral Consequences.

The district court erroneously held that due process was violated because, aside from a "single reference to the terms 'deportable' and 'excludable,'" the forms do not further mention the immigration consequences of a final order. E.R. 483. Although the 274C forms state the money penalty sought, there is in fact no constitutional requirement that notice of any penalty, whether direct or hypothetical, be provided. See United States v. Arzate-Nunez, 18 F.3d 730, 737 (9th Cir. 1994) (statute gave adequate notice of potential penalty, therefore, government not bound even by misinformation in notice concerning penalty for reentering the country). A criminal indictment, for example, does not normally state the possible criminal sentence. See Fed. R. Crim. P. 7(c).

Although a defendant in a criminal or civil proceeding has no due process right to individual notice of the statutory penalties at the charging stage, if and when the person waives rights--such as the right to a hearing on a civil document fraud charge--he must be informed of the direct consequences of the waiver. Direct consequences of an action are those consequences that are definite and immediate, such as the civil money penalty here or a prison sentence imposed on a criminal defendant who pleads guilty. See, e.g., Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988). Collateral consequences are those that do not immediately result from the waiver, such as the immigration consequences here. See, e.g., King v. Dutton, 17 F.3d 151, 153-54 (6th Cir. 1994) (enhancing effect a conviction may have on future criminal sentence is a collateral consequence of conviction).

Despite the importance collateral consequences may have to the defendant, courts uniformly hold that a waiver of fundamental rights is knowing and voluntary even if the defendant is not advised as to those consequences. Fruchtman v. Kenton, 531 F.2d 946, 948-49 (9th Cir. 1976); United States v. Chavez-Huerto, 972 F.2d 1087, 1089 (9th Cir. 1992) (due process did not require notice of collateral consequences of waiving right to appeal civil deportation order).

Courts have held that the immigration consequences of a conviction are collateral. Steinsvik v. Vinzant, 640 F.2d 949, 956 (9th Cir. 1981). Yet the district court found the 274C forms defective because they do not communicate that deportation is "permanent" or "automatic" and that there is "almost no chance" of readmission. See, e.g., E.R. 459-60, 462, 466, 481, 484-86. However, the impact of deportation upon future readmission is a collateral consequence of the deportation order, just as deportation itself is a collateral consequence of a final 274C order, imposing a civil money penalty. The court effectively found a due process violation because INS did not give plaintiffs notice of the consequences that are doubly collateral.

Nonetheless, as the record shows, the NOR/W sets forth in conspicuous language the definite immigration consequences that are collateral to a final order:

> If you are not a citizen of the United States, you are further advised that, as an alien subject to a Final Order for a violation of Section 274C of the Act, you will be excludable pursuant to Section 212(a)(6)(F) of the Act, and deportable pursuant to Section 241(a)(3)(C) of the Act.

E.R. 331. This specific, accurate notice informs individuals of the possible collateral consequences of a final order and, thus, substantially exceeds the requirements of due process.

Moreover, contrary to the court's ruling, the reference to the relevant statutes does not make the notice inadequate. Indeed, this Court has held in other immigration-related cases that the statute itself, in English, provides "fair notice" of potential penalties for violating the law. United States v. Ullyses-Salazar, 28 F.3d 932, 936 (9th Cir. 1994), cert. denied, 115 S. Ct. 1367 (1995), overruled on other grounds by United States v. Gomez-Rodriguez, 96 F.3d 1262 (9th Cir. 1996) (en banc); United States v. ' , 70 F.3d 575 (11th Cir. 1995), cert. denied, 116 S. Ct. 1370 (1996). Thus, in Ullyses, where the government form erroneously stated a potential term of imprisonment more than seven times less severe than the statute, this Court held that the statute provided reasonable notice of the potential consequences. The forms challenged here accurately advise that aliens with final orders will be deportable and inadmissible in accordance with the INA.

Finally, by requiring the INS to inform aliens that deportation or exclusion is "automatic," the district court overstated the collateral effects of a final order. First, as defendants explained to the court, no one can know all of the collateral immigration consequences of a 274C final order in a particular case prior to the deportation hearing. This is particularly true here because the applicability of various waivers is in the early stages of development. Second, IIRIRA §345 provides explicitly for a waiver of both inadmissibility and deportability to individuals with 274C final orders. As with any waiver, an alien seeking relief must meet the legal prerequisites. Given §345, however, it simply is wrong to suggest that deportation follows "automatically" from a final order, or that there is no possibility of obtaining a deportation waiver.[11]

(b.) Court Erred in Ruling on Basis of "Legalistic" Language.

The district court also found that the forms violated due process by using "legalistic" language and citations. E.R. 483, 486. This finding was immaterial, however, because plaintiffs did not claim that the "legalistic" phrases confused them or that they made incorrect decisions based upon such confusion. E.R. 339-40. The court also ignored evidence that the forms communicated the immigration consequences of a final order and explained how to request a hearing. E.R. 66-67, 78-87, 239, 250-51, 366.

Furthermore, this Court has considered the NIF that the INS used to institute employer sanctions cases under 8 U.S.C. § 1324a and found it to be constitutionally sufficient. Kirk v. INS, 927 F.2d 1106, 1107 (9th Cir. 1991); compare E.R. 393-95 (example of

[11] The district court acknowledged that the new law provides a waiver to those charged with document fraud. E.R. 550-51. It continued to hold, however, that the INS should communicate that deportation is permanent and automatic. Id.

employer sanctions NIF) with E.R. 332-34 (NIF for Cruz-Garcia). The Court found:

> Procedural due process requires adequate notice and an opportunity to be heard. The Kirks received notice of the action when they received the NIF. The NIF informed them of their right to a hearing. The NIF initiates the adjudicatory process. Thus, the requirements for procedural due process were met when the Kirks were served with the NIF. They had notice of the charges against them and they had an opportunity to request a hearing.

927 F.2d at 1107-08. Here, the district court's rejection of Kirk (E.R. 488), as only concerning the propriety of service, cannot stand. Kirk stands as compelling authority that the NIF in this case satisfies constitutional standards.

3. English-Language 274C Forms Satisfy Due Process.

The district court erred in finding that the INS should have initiated the 274C program using Spanish-language forms. The court's Spanish-language requirement is a dramatic departure from the general rule that persons, whether aliens or citizens, have no right to notice in their native language. See Yniguez v. Arizonans For Official English, 69 F.3d 920, 936 (9th Cir. 1995) (en banc) (citing cases holding that "non-English speakers have no affirmative right to compel ... government to provide information in a language they can comprehend"), cert. granted, 116 S. Ct. 1316 (1996); Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973) (no due process violation where notice of denial of benefits provided in English to Spanish-speaking individuals).

The district court erroneously stated that courts have "frequently held that adequate notice requires accommodation of both the language limitations of a non-citizen audience and educational limitations of the intended recipients." E.R. 487. Indeed, courts have repeatedly held that English notice to a person in the United States is "reasonably calculated to apprise individuals of the proceedings." See, e.g., Soberal-Perez, 717 F.2d at 43; Toure v. United States, 24 F.3d 444, 446 (2d Cir. 1994) (notice of asset forfeiture proceeding in English did not violate due process); Kim v. United States, 822 F. Supp. 107 (E.D.N.Y. 1993) (no due process violation when food stamp disqualification notice provided in English). The Constitution should not be read as granting greater rights to non-citizens than citizens.

The district court's "reasonable notice" interpretation would, if applied uniformly to all non-English-speakers, impose a tremendous fiscal and administrative burden on the INS, and presumably other federal and state agencies, by dictating that forms be translated into every language in order to communicate in each recipient's native tongue. Requiring notice to be "in whatever language is spoken by any person or groups affected ... would virtually cause the processes of government to grind to a halt." Carmona v. Sheffield, 325 F. Supp. 1341, 1342 (N.D. Cal. 1971), aff'd, 475 F.2d 738 (9th Cir. 1973).

(a.) Duty to Inquire

In assessing whether an individual received adequate notice of adverse government action, courts have held that where notice is in English and the recipient does not understand the language, the individual has the burden of further investigation. See Soberal-Perez, 717 F.2d at 42-43 (rejecting due process claims of Spanish speakers who waived hearings on disability benefit denials, noting that a person who does not understand notice in English is charged "with duty of further inquiry . . . [a] rule placing the burden of diligence and further inquiry on the part of a non-English-speaking individual served in this country with a notice in English does not violate any principle of due process"); Vialez v. New York City Housing Authority, 783 F. Supp. 109, 119 (S.D.N.Y. 1991) (finding that individual challenging a tenancy termination had "inquiry notice," defendants' inability to read English did not render "them incapable of understanding the need for further inquiry"); Toure, 24 F.3d at 446 (English-only asset forfeiture notice was consistent with due process; form put reasonable person on notice that translation was required); Kim, 822 F. Supp. at 111 (prudent person would seek translation).

Thus, the due process right is coupled with the duty of inquiry. Cf. Survivors, 473 U.S. at 329 (court erred in establishing procedural requirements, where there was no indication that unintended forfeiture of rights would be suffered by "diligent claimant"). The challenged English-language 274C forms are calculated to inform reasonable persons of the forms' contents. Because 274C violations can be committed by citizens and aliens, the forms can be served on anyone in the United States, not just Spanish-speaking aliens. A person who is illegally present or working in the United States using false identification, and who is given documents by a law enforcement agent, must reasonably be expected to inquire further if he does not understand the documents he receives.

(b.) Effect of IIRIRA Section 304

In determining that due process requires Spanish translation of 274C forms, the district court held that, because the OSC is translated into Spanish, individuals who receive both deportation and document fraud papers could be confused and conclude that the English-only 274C papers are "inconsequential." See, e.g., E.R. 484, 486; section I.A. supra. Section 304 of IIRIRA, however, amended the law, such that the papers initiating deportation proceedings no longer need to be translated into Spanish. The district court did not dispute that §304 profoundly detracts from its conclusion that the 274C documents must be translated into Spanish. E.R. 549-50. Rather, the court only stated that its translation requirement was based on "other" reasons. Id. As explained above, however, these reasons were premised on unsupported facts, such as the language abilities of 274C recipients. See section I.A. supra.

(c.) Oral Explanations

The district court compounded its error when it discounted the unrebutted evidence that 274C forms were generally served by Spanish-speaking INS agents, who supplemented the English forms with written and/or oral Spanish explanations if requested, provided answers to questions in Spanish, and allowed aliens to take the forms to a lawyer or bilingual friend prior to responding to the charges. E.R. 74-75, 77, 78-82, 84-87, 181-83, 213-17, 226-27, 237, 239, 250-51, 260-69, 271-74, 277-80, 300-02, 327-28, 336, 342-43, 366, 368, 370-71, 374, 376, 378, 379, 398-403, 407.

A finding that the forms alone satisfy due process is sufficient to enter summary judgment for defendants. See infra sections I.B, IV.A. To grant summary judgment to plaintiffs, however, the court could not find a due process violation based on the forms alone because oral explanations were available. Oral notice often satisfies due process. See Panozzo v. Rhoads, 905 F.2d 135, 138-139 (7th Cir. 1990); Brown v. Youth Center, 883 F. Supp. 572, 581-82 (D.Kan. 1995), aff'd, 74 F.3d 1248 (10th Cir. 1996). The court acknowledged that recipients were not necessarily deprived of due process based on the forms.[12] The court erred in granting summary judgment to plaintiffs without knowing, inter alia, what oral information was available in addition to the forms. See infra Part II.C.

4. District Court's Mathews v. Eldridge Balancing is Flawed.

In assessing the forms' adequacy, the district court conducted a balancing test pursuant to Mathews v. Eldridge, 424 U.S. at 335. E.R. 480-90. Factors balanced pursuant to Mathews include the (1) private interest affected by the official action;

[12] The court noted that plaintiffs might have received adequate notice if, for example, they "read and understood the form" or were "given an additional, easily understood explanation" of their rights. E.R. 499, 511.

(2) risk of erroneous deprivation of such interest through the governmental procedures used, and value of additional or substitute procedural safeguards; and (3) government's interest. 424 U.S. at 335.[13] The district court's Mathews balancing was flawed for three reasons.

First, the court failed to specify the private right at stake, asserting only that "[t]here can be no serious dispute that the private interest here is great." E.R. 480. The court erroneously concluded that aliens with final orders "face essentially automatic deportation and permanent exclusion."[14] E.R. 480-90. This incorrectly implies that the private interest at stake is the right to remain in the United States. But, there is "no substantive due process right not to be deported." Linnas v. INS, 790 F.2d 1024, 1031 (2d Cir. 1986); Harisiades v. Shaughnessy, 342 U.S. 580, 590-91 (1952). Instead, at stake are the interests in having the opportunity to request a hearing when charged with a 274C violation and in not being erroneously found to have committed document fraud.

Second, the court miscalculated the risk of erroneous deprivation, partly because it misidentified the private right at

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13 The court's application of Mathews is reviewed de novo. McConney, 728 F.2d at 1201.

14 The court's implication that deportation is a grave penalty is contrary to recent congressional statements. Congress criticized judicial decisions "characteriz[ing] deportation as a grave penalty" and "suggest[ing] that statutory ambiguities be resolved in favor of the alien." See Purpose & Summary of the Senate Judiciary Comm. Report on S. 1664, enacted as IIRIRA, at 7.

stake. Section 274C procedures do not create an unreasonable risk of erroneous deprivation of the right to contest the document fraud charges. A reasonable person who receives the NIF and NOR/W is given notice of the charge and means of contesting it. If plaintiffs did not understand the forms, they needed to inquire further. See supra section I.B.2, 3. Also, plaintiffs have not shown they were misled by the language or formatting criticized by the court.

Third, the district court failed to give due weight to the government's interest in controlling the borders and enforcing immigration laws. See Landon, 459 U.S. at 34-35 (due process "does not extend to imposing procedures that merely displace congressional choices of policy"); Survivors, 473 U.S. at 326 (under Mathews, "great weight" is accorded to government's interests). Document fraud undermines an important governmental interest. Villegas-Valenzuela, 1996 WL 729585 at *1, *5. Mathews looks to the government's interest in its procedures and the value, as well as the burden, of additional procedures, such as written translations of 274C forms into foreign languages. Here, the court did not accord sufficient weight to the government's significant interest in enforcing the 274C program, finding instead that the only relevant consideration was the supposed "one-time expense" of redrafting the forms in accordance with the court's orders. E.R. 489-90. Nor did the court consider the burden of retroactively imposing an entitlement to Spanish-language forms. Id.

When the Mathews balancing is conducted properly, the governmental interest in enforcing the 274C program and the heavy burden associated with retroactively and prospectively providing Spanish-language notice forms to all recipients, significantly outweighs the small risk that the current forms would erroneously deprive plaintiffs of their right to request 274C hearings.

5. No Showing of Prejudice.

Due process requires plaintiffs to demonstrate that the government's alleged error potentially affected the outcome of the proceedings. Barraza Rivera v. INS, 913 F.2d 1443, 1448 (9th Cir. 1990); United States v. Alvarado-Delgado, 98 F.3d 492, 493-94 (9th Cir. 1996) (must establish plausible grounds of relief which would have been available but for the deprivation); Villegas-Valenzuela, 1996 WL 729585 at *6 (prejudice required for document fraud claim of insufficient notice). As shown below, plaintiffs could not demonstrate prejudice and, therefore, should not have been granted summary judgment on the due process claim. See infra section III.C.

II. This Case Should Not be Certified as a Class Action.

A. Governing Legal Principles

In accordance with Fed. R. Civ. P. 23(a), a class should be certified only if: (1) the class is so numerous that joinder is impracticable, (2) there are questions of law or fact common to the class, (3) the named-plaintiffs' claims or defenses are typical to those of the class, and (4) the named-plaintiffs will fairly and adequately protect the interests of the class. These four requirements must all be satisfied, as well as one of the requirements of subsection (b) of Rule 23. In re Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 854 (9th Cir. 1982). Here, the district court certified the class under Rule 23(b)(2). E.R. 470.[15]

This court reviews the decision to grant class certification for an abuse of discretion or for application of impermissible legal criteria. Moore v. Hughes Helicopters, 708 F.2d 475, 479 (9th Cir. 1983); California Rural Legal Assist. v. Legal Svcs. Corp., 917 F.2d 1171, 1174 (9th Cir. 1990). The Supreme Court held that a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites" of Rule 23 are satisfied. General Tel. v. Falcon, 457 U.S. 147, 161 (1982).

Here, the district court certified a class of:

> All non-citizens who have or will become subject to a final order under Section 274C of the Immigration and Nationality Act because they received notice forms that did not adequately advise them of their rights, of the consequences of waiving their rights or of the consequences of failing to request a hearing.

E.R. 475.

B. Terms of the Court's Orders.

The district court entered a class-wide injunction against the INS enjoining it from using the 274C forms. The court did

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[15] Rule 23(b)(2) requires that:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole . . .

not, however, hold that the individual aliens' due process rights were violated. Instead, the court created a system of determining whether each recipient is, in fact, a class member and whether he received "constitutionally adequate notice despite having received the section 274C notice forms that the Court has found defective," because, for example, he "read and understood the form" or was "given an additional, easily understood explanation" of his rights." E.R. 499, 511.

The following summarizes the procedures that the district court required in order to determine whether an alien with a final order received constitutionally adequate notice. Each putative class member has 120 days to attest that he failed to request a document fraud hearing because he lacked adequate notice. E.R. 511. The INS then decides whether to challenge this claim of inadequate notice in a hearing before an ALJ from the Office of the Chief Administrative Hearing Officer ("OCAHO"). At the hearing, the INS must show, by a preponderance of the evidence, that, contrary to the alien's attestation, he understood his rights when he failed to request a hearing. E.R. 511.

If the ALJ finds that the alien understood his rights, the alien may appeal to the district court. If the court upholds the finding, the 274C final order will be affirmed. If the ALJ or district court finds that the alien did not understand his rights, the 274C proceedings must be reopened. The INS may decide to recharge the alien with court-approved forms. If the alien is not recharged within 30 days, his 274C final order is vacated. E.R. 512.

If the alien is recharged, he is again given an opportunity to request a 274C hearing or waive his right to request a hearing. If he requests a hearing, the INS files a complaint with OCAHO presenting evidence of the fraud. The alien is then given an opportunity to present a defense to the charges. The ALJ may issue a summary decision or hold a hearing at which testimony is taken and evidence is presented. Then, the original 274C final order is either vacated or affirmed. E.R. 512.

If, at any point, an alien's final order is vacated, the INS is required to join in a motion to reopen the deportation proceedings if the deportation order was based on a 274C final order or if the class member seeks relief from deportation for which he might have been eligible but for the 274C final order. E.R. 512. As explained below, such elaborate, individualized procedures do not promote judicial economy or the purpose of Rule 23.

C. Court Disregarded Purpose of Rule 23.

The principal purpose of Rule 23 is to litigate common questions of law and fact at once, thereby promoting judicial "efficiency and economy." Falcon, 457 U.S. at 159 (reversing affirmance of class certification for lack of commonality); Califano v. Yamasaki, 442 U.S. 682, 701 (1979). Here, the district court acknowledged that the class members' claims do not share a common factual basis. Relying on Blackie v. Barrack, 524

F.2d 891, 904 (9th Cir. 1975), however, the court held that the class members need only share one common issue of law to satisfy the commonality requirement of Rule 23(a). E.R. 468. In Blackie, however, this Court stated that courts should interpret the commonality requirement of Rule 23(a) consistent with its purpose, *i.e.* to "avoid[] duplicative" trials. 524 F.2d at 904, n.19.[16]

Contrary to the purpose of Rule 23, the court certified a class while acknowledging a lack of factual commonality, stating:

> The Court agrees with the INS that the plaintiffs cannot show that all of their cases share a common factual basis. Some ... claim that INS agents misrepresented to them the consequences of waiving their rights or the consequences of a final order, while others claim simply that the INS agents did not provide adequate written or oral notice. Some members ... were issued NIF forms by offices that refuse to use the English-only NOR/W or ... that do not accept waivers. Obviously a plaintiff who admits that he understood what the waiver form meant, refused to sign it, and simply failed to request a hearing in time is on different footing than a plaintiff who did not understand the waiver form and signed it believing it was inconsequential.

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[16] The court in this case erred by finding commonality based on one common legal issue. The sentence in Blackie on which the court relied is dicta. In Blackie, there were many common issues of fact and law. 524 F.2d at 902. In Blackie, "similar misrepresentations" were made to all plaintiffs and there were only "slight differences in class members' positions." *Id.* Unlike Blackie, the court here found that there was no "common factual basis" on which to certify a class. *See also* *Yassini v. Crosland*, 613 F.2d 219, 220 (9th Cir. 1980) (no certification despite common factual basis because INS actions had disparate effects on plaintiffs); *Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656, 663 (N.D. Ca. 1976), *aff'd*, 602 F.2d 925 (9th Cir. 1979) (lack of commonality because each case factually different despite common issue of law involving due process); 7 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §1763 at 604 (rule requires that "more than one issue of law or fact must be common" to the class).

E.R. 469. The court ordered that up to four individualized proceedings be held for each alien to resolve each due process claim--the gravamen of this case--thereby not achieving or promoting judicial "efficiency and economy."[17]

As the district court acknowledged, the individualized proceedings will be fact-specific and vary with each member of the class. Each alien may be required to testify under oath about the circumstances surrounding his failure to request or waiver of his right to a 274C hearing. E.R. 510. The government is allowed to demonstrate that the individual "received constitutionally adequate notice despite having received the section 274C notice forms that the Court has found defective." E.R. 511. To meet its burden, the INS must be able to question the alien on fact-specific issues. For example, the INS would inquire about whether the alien understood the charges and the consequences of waiving his right to a hearing; whether he received oral or written translations of the forms from an agent or anyone else; the extent of his ability to speak and read English; whether the alien was represented by counsel; and the extent to which he relied on statements of INS agents.

If the alien's 274C proceeding is reopened and the INS recharges him, he may then request a 274C hearing. E.R. 512. If

[17] These proceedings include a hearing before an ALJ on the notice issue, the district court's possible review of the ALJ's determination, the 274C merits hearing before an ALJ, and the possible reopening of the alien's deportation proceedings.

a complaint is filed, the alien must answer or defend against the charges. Again, this necessarily will be an individualized, fact-specific proceeding.[18] If the alien's 274C order is vacated, an individualized deportation proceeding could then be held.

Thus, the district court's order demonstrates the impropriety of class treatment. The court required several individualized hearings to resolve each alien's due process claim which violates the purpose of Rule 23. Class certification is not appropriate. The court's own order is the best evidence of this.

D. Certification Improper Under Rule 23(b)(2).

The need to adhere strictly to Rule 23(a)'s commonality requirement before entering a class-wide injunction under Rule 23(b)(2) is demonstrated in Nguyen. 70 F.R.D. at 667. There, plaintiffs alleged that Vietnamese children were brought to the United States in violation of due process without proper documentation showing that they were orphaned. Id. The court held that the requirements of Rule 23(b)(2) were not satisfied because, even if a class were certified, the court would be faced with "[s]ome two thousand individual adjudications." Id. There must be an "extremely close identity of common questions and of typical claims . . . [where plaintiffs seek, pursuant to Rule

[18] At this stage the alien will be required to demonstrate that, even if his due process rights were violated, he suffered some prejudice as a result. See sections I.B.5. and III.C. This also is not capable of class-wide proof.

23(b)(2),] to enjoin defendants from further acting on grounds generally applicable to the class as a whole." This "close identity" was lacking because of the individualized nature of each person's due process claim. Nguyen, 70 F.R.D. at 667 (emphasis added).

Also, in Yassini this Court held that certification under Rule 23(b)(2) was improper due to the great variations in the class members' claims. 613 F.2d at 220. The named-plaintiffs were Iranian nationals for whom the INS announced a deferred departure date from the United States. They sought an injunction preventing the INS from revoking that date. Despite a common factual basis to the claims, the Court held:

> [A]lthough the [INS] directive purported to deprive every plaintiff of the June departure date, that deprivation had significantly disparate effects. Some of the plaintiffs face immediate deportation .... Others merely face the commencement of deportation proceedings. Varied circumstances, no doubt, led individuals to accept the deferred departure date.... [E]ach recipient had to act personally to take advantage of the offer ... [Q]uestions unique to each individual would appear to predominate.

613 F.2d at 220 (emphasis added).

Likewise, in this case, there is no "extremely close identity of common questions and of typical claims" under Rule 23(a) which must exist before a class-wide injunction is ordered. Nguyen, 70 F.R.D. at 667. In fact, the district court found that there was no common factual basis on which to certify a class, and merely one common legal issue. As in Yassini, the circumstances surrounding each alien's failure to request a hearing vary. In recognition of this, the district court in this case ordered thousands of individualized hearings to resolve the class members' claims. In this situation, class certification pursuant to Rule 23(b)(2) was an abuse of discretion. Id. at 667.

E. Court Failed to Analyze Adequacy of Class Representatives.

Defendants also argued that the named-plaintiffs are not adequate class representatives because they admitted, under grants of immunity from criminal prosecution, that they committed document fraud. C.R. 86 at 28-34. Under Ninth Circuit law, no due process violation has been proven unless the alien can show prejudice, i.e., that the alleged violation potentially affected the outcome of the proceedings. Barraza, 913 F.2d at 1448. The named-plaintiffs acknowledged their guilt to the 274C charges. Thus, even had they requested such hearings, final orders would likely have issued.

Because the named-plaintiffs' claims will be subject to unique defenses due to their admissions pursuant to grants of immunity, they are not adequate class representatives. Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (inadequate representative because he had "unique background and factual situation").

The district court in this case rejected this point stating that it called for "actual[] litigation on the merits, rather than on the class certification issue." E.R. 471. This Court, however, has held that a Rule 23 analysis may require a review of the merits of the underlying case. Hanon, 976 F.2d at 509 (evidence may "relate to the underlying merits of the case"); Blackie, 524 F.2d at 897.

The district court in this case also held that:

> It is possible, even likely, that some members of the class will seek to have their document fraud proceedings reopened only to discover that they cannot mount an effective defense to the charge. That some members of the class are not entitled to ultimate relief on the charges of document fraud is not, however, dispositive of the issue of whether there exists a class of aliens who did not receive adequate notice of their rights and the consequences of waiving those rights.

E.R. 471-72 (emphasis added). The issue before the district court, however, was not whether "some   of the class" would be able to mount a defense to the charges but whether the inability of the named-plaintiffs to mount a defense damaged the claims of the unnamed class members who might have valid defenses to the charges. Because they were subject to unique defenses, the named-plaintiffs were not adequate class representatives. Thus, the court erred in certifying the class.

III. Systemwide Injunction Was Improperly Based on a Finding of Two Instances of Possible Prejudice.

The district court entered a permanent injunction against the INS based on its grant of summary judgment to plaintiffs. The requirements for a permanent injunction are "essentially the same" as for a preliminary injunction except that, to enter a permanent injunction, plaintiffs must show "actual success on the merits" rather than a likelihood of success. Amoco Prod. v. Gambell, 480 U.S. 531, 546 n.12, 542 (1987). Plaintiffs must also prove legal remedies are inadequate and irreparable injury will result without entry of a permanent injunction. Id. at 542. The district court must also "balance the harms" and consider the effect of granting the requested relief with "particular regard" to the public interest. Id. at 542, 545-46.

The standard of review for a permanent injunction varies according to the functions that the district court performed. See, e.g., Multnomah Legal Servs. Workers Union v. Legal Servs. Corp., 936 F.2d 1547, 1552 (9th Cir. 1991). The court of appeals reviews the discretionary components of an injunction for the application of erroneous legal principles or an abuse of discretion. Guadamoz v. Bowen, 859 F.2d 762, 766 (9th Cir. 1988). The court's scrutiny of permanent injunctions is more expansive than the abuse of discretion review provided for preliminary injunctions. See Sports Form v. United Press Int'l, 686 F.2d 750, 752 (9th Cir. 1982).

A systemwide injunction of a governmental program warrants close scrutiny because it "tends to establish the norm that defines the future standard of conduct." See Toussaint v. McCarthy, 801 F.2d 1080, 1088-89 (9th Cir. 1986) (varied levels of scrutiny in "abuse of discretion" standard). Greater scrutiny is necessary because "the precedential value of the adoption of a particular remedy raises questions of consistency and authoritativeness that can be resolved similarly to the resolution of legal questions." Id.

The Court reviews questions of law de novo, such as success on the merits and inadequacy of legal remedies. See, e.g., Ornelas v. United States, 116 S. Ct. 1657, 1661-62 (1996). Irreparable injury is a question of fact which, as explained below, is closely related to the prejudice requirement for establishing due process violations. See, e.g., Alvarado-Delgado, 98 F.3d at 493-94.

Additionally, where the "factual determination underlying the injunction was not based upon trial, but rather upon a summary judgment[,] such factual determinations could only be based upon undisputed facts or facts about which there was no genuine issue." Premier Comm. Network v. Fuentes, 880 F.2d 1096, 1101 (9th Cir. 1987) (emphasis added). Accordingly, when an injunction is entered without a "trial upon facts" as anticipated by Fed. R. Civ. P. 52(a), there is no basis for applying the deferential "clearly erroneous" standard. Finally, the proper scope of an injunction must be limited to redressing actual injury established by plaintiffs. See Lewis v. Casey, 116 S. Ct. 2174, 2184 (1996).

A. Plaintiffs Were Not Entitled to Success on the Merits.

The summary judgment decision rests on flawed factual and legal premises. See supra Section I. Therefore, the injunction entered constituted an erroneous application of law.

B. Court Did Not Rule on Adequacy of Legal Remedies.

To enter a permanent injunction, the court must hold that legal remedies are inadequate. Amoco, 480 U.S.at 542. Plaintiffs presented no such evidence, and the court did not address this issue. Therefore, the injunction is erroneous and should be reversed.

C. Court Erred in Finding Irreparable Injury.

The district court erred in finding substantial and immediate irreparable injury warranting injunctive relief. Factual determinations underlying an injunction based upon summary judgment can only be based upon uncontested evidence. Premier, 880 F.2d at 1101. In evaluating injury "and hence standing to demand remediation," the court must examine what plaintiffs proved, not what was theorized. See Lewis, 116 S. Ct. at 2179; United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973) (judicial process is not a "vehicle for the vindication of the value interests of concerned bystanders"). To establish standing, injury must be "distinct" and "palpable," not "conjectural," or "hypothetical." Allen v. Wright, 468 U.S. 737, 751 (1984) (citations omitted). Courts can provide relief only for actual injury. See Lewis, 116 S. Ct. at 2179.

In this case, to establish actual injury, plaintiffs must demonstrate that they suffered substantial prejudice due to the alleged due process violation. See Alvarado-Delgado, 98 F.3d at 493-94 (must establish plausible grounds of relief available but for the deprivation); Villegas-Valenzuela, 1996 WL 729585 at *6 (prejudice required for 274C inadequate notice claim). Plaintiffs submitted no undisputed evidence of prejudice. In fact, the court disregarded the named-plaintiffs' admissions about their use of false documents. E.R. 153, 155, 157-60, 163-64 (Santana Alvarez); E.R. 68, 70-72, 76, 88, 91 (Walters); E.R. 96-101, 115 (Corona-Alvarez); E.R. 125-26, 132, 138, 147-50 (Adames); E.R. 170-71, 174-76, 178, 184-87 (Cruz-Garcia); E.R. 204-08, 54-56 (Meziab).

Given these admissions, if the named-plaintiffs received 274C hearings, the result would likely have been the same, i.e., final orders would have issued. No named-plaintiff asserted that he was prepared to deny committing document fraud or to present any defense when he failed to request a hearing or waived his right to do so. See E.R. 389-92, 91, 118, 138, 158-59, 163-64, 170-71, 174-76, 178, 98-101, 54-56 (named-plaintiffs' admissions). Even the court recognized that "[i]t is possible, even likely, that some members of the class will seek to have their document fraud proceedings reopened only to discover that they cannot mount an effective defense to the charge." E.R. 471-72. Nonetheless, the court erroneously found that two named-plaintiffs established prejudice sufficient for injunctive relief.

1. Santana-Alvarez

The court erred in finding actual injury to named-plaintiff Santana-Alvarez. In 1993, the INS charged Santana-Alvarez with falsely making an INS employer verification form, "I-9." E.R. 167. Before he waived his right to request a hearing, he was given the opportunity to ask questions about the charges. E.R.

160, 257-58. He admitted knowingly using false documents. E.R. 158-59; 163-64.

The court concluded, however, that Santana-Alvarez suffered prejudice because, in an unrelated case, an ALJ found that falsely making an I-9 did not violate 274C. E.R. 478. United States v. Remileh, 5 OCAHO 724 at 2-3 (1995) aff'd on other grounds, Remileh v. INS, 101 F.3d 66, 67 (8th Cir. 1996). The district court's conclusion is erroneous.

First, the Remileh cases emphasized that presenting false papers to an employer is a 274C violation. Id. Santana-Alvarez admitted that, to obtain employment, he knowingly presented false identification cards he purchased for $50. E.R. 155; 158-59; 163-64. The INS could have amended the charge based on these documents. Second, the court assumed without evidence that, had Santana-Alvarez received better forms, he would have requested a hearing, repudiated his admissions of guilt, and, prior to Remileh, argued that same defense. Third, IIRIRA §212 amended 274C to overrule the Remileh decision, clarifying that falsely making an I-9 is a violation of 274C. For these reasons, Santana-Alvarez cannot show prejudice.

2. Adames

The court also erred in finding actual injury to named-plaintiff Adames. She admitted to the INS that she knowingly used false documents to obtain work. E.R. 125-26; 132, 138, 147-50. She admitted that in August 1990, shortly before the effective date of 274C, she submitted fraudulent social security and work authorization cards to her employer. E.R. 121. After the effective date, a new employer took over the facility where she worked, at a time when she knew she was not allowed to be employed in the United States. E.R. 120. Adames signed a statement, that her English-speaking spouse witnessed, stating that she used the false identification documents with the second employer. E.R. 129-30, 147-50. Then, at her deposition, she denied that she used false documents the second time. E.R. 131-32.

The district court improperly resolved this conflicting evidence in plaintiffs' favor, finding that Adames suffered potential prejudice from her failure to request a hearing. The court opined that Adames could have "attempt[ed] to show that the document fraud charge was ex post facto." E.R. 478.

The court assumed without evidence that, if Adames received better forms, she would have timely requested a hearing and presented the defense argued by the court. In reality, however, Adames suffered no cognizable injury because she habitually fails to read documents she is provided. E.R. 140-41, 146. She testified about the §274C rights advisal she received: "[t]he truth is, I didn't even look at it . . . . I didn't look to see if it was in Spanish or English." E.R. 133. She also received a Spanish-language version of the NOR/W in addition to the English-language form. E.R. 140-41; 226, 228.

Adames admitted that the <u>only</u> reason she did not request a hearing was because she believed she broke the law when she presented false documents.[19] E.R. 138. Her spouse, who was with her during processing, testified that the English-language NOR/W clearly indicates that his wife would be deportable if a final order of document fraud was entered against her and they would have realized this if they read the forms.[20] E.R. 195-98.

Therefore, the court erred in finding prejudice and, thus, actual injury.[21] Alleged injuries that are not suffered by a named-plaintiff are "not the proper object of this District Court's remediation." Lewis, 116 S. Ct. at 2183. Thus, there is no irreparable injury to sustain this permanent injunction.

D. Court Improperly Balanced the Hardships.

The district court abused its discretion in entering the injunction without "particular regard" to the "important role of the 'public interest' in the exercise of equitable discretion." Amoco, 480 U.S. at 545-46. The interest in vindicating the procedural rights of Santana-Alvarez and Adames, assuming they suffered prejudice, does not supersede all other relevant interests in this lawsuit. The court failed to recognize that

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19 After she and her attorneys reviewed the deposition transcript, Mrs. Adames modified this response. E.R. 151.

20 After a break in his deposition, Mr. Adames attempted to retract his earlier concession that the form clearly indicates this. E.R. 199-201.

21 The court also erroneously concluded that recipients might show prejudice because of the possibility of prosecutorial discretion. The possibility of unreviewable prosecutorial discretion is no basis for finding prejudice to persons who admitted violating the law. California v. United States, No. 95-55490, 1997 WL 3315, *7 (9th Cir. January 7, 1997). The district court also acknowledged there is an "absence of evidence in the record on these issues." E.R. 479.

the "public interest may be the paramount consideration when a broad regulatory scheme is at stake." Ofosu v. McElroy, 98 F.3d 694, 702 (2d Cir. 1996).

Balanced against the lack of evidence showing widespread injury, enforcement of the 274C program is paramount. The public has an interest in using the current 274C procedures to help curb illegal immigration. See 136 Cong. Rec. S13,629 (Sept. 24, 1990) (Sen. Simpson); Villegas-Valenzuela, 1996 WL 729585 at *1, *5. The court failed to consider the disruption to the 274C program and other programs resulting from its adoption of plaintiffs' requested relief. See E.R. 534 (OCAHO exhibit); 520-24 (Slattery Declaration); 525-33 (Martin Declaration) (injunction diverts resources from processing requests for relief from deportation, removing criminal aliens, and protecting borders). The court should have considered such factors before altering the status quo and creating new rights and entitlements as well as elaborate procedures to effectuate them. See supra Part II.B. The injunction should be reversed.

E. Even if an Injunction Were Warranted, This Injunction Exceeds Proper Scope.

Assuming arguendo that some constitutional violation was established, the injunction exceeds the scope of a constitutionally appropriate remedy. The court abused its discretion in granting the relief ordered because, "two instances [of actual injury are] a patently inadequate basis for a conclusion of systemwide violation and imposition of systemwide relief." Lewis, 116 S. Ct. at 4587 (emphasis added); Survivors, 473 U.S. at 324 n.11 ("anecdotal evidence" concerning two claimants insufficient to conclude that program was operated contrary to regulation). Injunctive relief even in a class action must be tailored to the specific injuries proven. Lewis, 116 S. Ct. at 4587. As explained above, even if there were two instances of actual harm, this is not "widespread enough to justify systemwide relief." Id. at 2184. Therefore, no classwide injunction should have been entered.

Even assuming that classwide injunctive relief was appropriate, the provisions of this injunction are extreme and unwarranted and constitute an abuse of discretion.

1. Excessive Publicity Campaign

The court abused its discretion when it ordered the INS to publicize the class action and the opportunity for reopening "to every news organization in the United States and Central and South America," to over 800 non-profit immigration groups in the United States, to international organizations, and in the federal register, in addition to mailed notice. E.R. 509; see also 535-38 (Mueller Declaration). Particularly, it is an abuse of discretion to enter an injunction that reaches almost the entire Western Hemisphere on the basis of findings of prejudice to two Mexican nationals. The court ordered burdensome, and perhaps impossible, publication in at least eighteen countries in which no named-plaintiff was a national (five are citizens of Mexico, one is a citizen of France). E.R. 510. The court required the INS to distribute notices in Spanish and English in countries in which the native languages are French or Portuguese. Such requirements do not redress actual injuries. "The scope of injunctive relief is dictated by the extent of the violation established, not by the [possible] geographic extent of the plaintiff class." Lewis, 116 S. Ct. at 2184 (citation omitted).

2. Court Abused Discretion in Ordering Parole.

The court ordered the INS "to parole or make alternative arrangements to allow class members . . . to return to the United States to attend [potentially four separate] hearing[s]." See E.R. 513. This overbroad remedy cannot stand based on the two cases of actual injury found. Neither Santana-Alvarez nor Adames requires this remedy. Hardline Elec. v. International Bhd. of Elec. Workers, 680 F.2d 622, 626 (9th Cir. 1982) (lack of factual support for injunction). Therefore, the parole requirement is an abuse of discretion and erroneous application of law.

(a.) Mendez v. INS

In ordering classwide parole, the court relied on Mendez v. INS, 563 F.2d 956, 958-59 (9th Cir. 1977). There, the criminal sentence on which an individual's deportation was based was vacated. Here, the parole reaches people whose basis for deportation was not vacated or who voluntarily left the United States. Also, Mendez is based on a provision of the INA amended by IIRIRA §306(b). Previously, an alien's departure from the United States deprived the court of appeals of jurisdiction. As of April 1, 1997, jurisdiction is authorized notwithstanding an alien's departure from the United States.

Contrary to the court's finding, Mendez was not paroled to "attend reopened deportation proceedings" but to "pursue administrative and judicial remedies" that were not available due to the jurisdictional bar. Compare E.R. 502-03 (emphasis added) with 563 F.2d at 959 (emphasis added). In any event, Mendez is not authority for this extraordinary classwide relief.

(b.) IIRIRA

The Court also based its requirement on 8 U.S.C. § 1182(d)(5), which authorized the Attorney General, in her discretion, to allow parole "for emergent reasons or for reasons deemed strictly in the public interest." E.R. 502; see also IIRIRA §303(a) (after April 1, 1997 no judicial review of decision to grant parole). Now parole is allowed in the Attorney General's discretion "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." IIRIRA §602 (emphasis added). The class-wide parole ordered violates § 1182(d)(5).

Additionally, under IIRIRA, the court lacked jurisdiction to hear a claim arising out of the execution of a removal (i.e. deportation) order. See infra III.E.3(a). Section 306(a) of IIRIRA prohibits the reversal of a deportation order.

(c.) Excessive Burden

Finally, the parole requirement is excessively burdensome to the INS. See, e.g., Meinhold v. Dep't of Defense, 34 F.3d 1469, 1480 (9th Cir. 1994). It requires the INS to establish burdensome and disruptive procedures for identifying class members at the border, to monitor, and perhaps detain them pending one of the hearings provided for by the court, or to conduct multiple hearings at the border or abroad. See E.R. 520-33.

3. Court Erred in Enjoining Deportation.

The court abused its discretion in prohibiting the INS from "enforcing or taking any action in reliance on § 274C final orders issued without hearings, . . . or from deporting class members." E.R. 511. The injunction also prohibits the INS from deporting any potential class member until at least 120 days after the notice campaign begins and at most until the adjudication of all four potential hearings ordered by the court. Id.

(a.) IIRIRA

Under IIRIRA, the district court lacks jurisdiction to issue this prohibition against deportation ("removal").[22] Section 306(a) of IIRIRA amended §242 of the INA to state:

> (g) EXCLUSIVE JURISDICTION-Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

Section 306(a) "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation or removal proceedings under such Act." IIRIRA §306(c). Therefore,

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[22] The Court reviews jurisdictional questions de novo. Scott v. Younger, 739 F.2d 1464 (9th Cir. 1984).

the district court lacked jurisdiction to order the INS to suspend the deportation of class members.

The court erred in finding §306(a) inapplicable in this case. In opposition to defendants' Motion for Reconsideration, plaintiffs claimed for the first time that this lawsuit does not challenge "any aspect of class members' deportation proceedings" so IIRIRA does not apply. C.R. 160. Despite this late contention, one of plaintiffs' primary goals in this case has been to halt deportation of class members. See, e.g., E.R. 22. They argued that the forms did not adequately inform them of the deportation consequences of a document fraud final order, and therefore their deportation orders should be reopened. Their current effort to deemphasize their primary objective and avoid application of IIRIRA must be rejected.

Section 242(g) bars the district court from rescinding deportation orders and from prohibiting deportation of class members. The provision, effective immediately, makes clear that challenges to deportation orders may only be presented by way of a review petition in the Court of Appeals.[23] Even assuming the district court's authority to declare the 274C forms deficient, it lacked jurisdiction to enjoin deportation.

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[23] IIRIRA §242 commits "exclusive jurisdiction" to certain forums and provides that "no court shall have jurisdiction" over the decision to "execute removal orders" except those courts specified. It requires consolidation of all issues that affect deportation, providing that "all questions of law and fact, including interpretation and application of constitutional and statutory provisions ... shall be available only in judicial review of a final order under this section." Compare Cheng Fan Kwok v. INS, 392 U.S. 206, 215 (1968) with IIRIRA §242(b)(9).

This Court should reject the district court's assertion that prohibiting deportation merely provides a remedy for the "deficient" document fraud notice forms and so §242(g) does not apply. Such a remedy is error where, as here, the district court lacks jurisdiction to order such relief.

(b.) Overbroad

The prohibition on taking any action in reliance on a 274C final order is overbroad and an abuse of discretion. As explained below, if an alien requests reopening, without showing prejudice such as a defense to the charges, deportation proceedings are delayed pending four possible hearings. This is excessive.

4. Court's Injunction Requires No Showing of Prejudice.

The injunction imposes sizeable administrative and financial burdens without requiring beneficiaries to show prejudice initially. Ordering numerous hearings without a showing of prejudice is wasteful and overbroad. An injunction "should be no more burdensome than necessary to provide complete relief to plaintiffs." Meinhold, 34 F.3d at 1480.

Aliens with final orders may have their cases reopened by signing a form stating that they did not understand the 274C procedures. E.R. 510. This violates longstanding requirements of reopening. Caruncho v. INS, 68 F.3d 356, 360-61 (9th Cir. 1995). Moreover, in thousands of cases, the following steps must be taken without individual showings of prejudice. The INS must review all class members' files and provide class counsel with certain data and updates; review files to determine whether it is practicable to challenge claims of inadequate notice before ALJs from OCAHO; promulgate court-approved forms and serve them within 30 days;[24] and marshall the evidence for filing complaints with OCAHO. E.R. 509-13, 520-33. OCAHO must then process potentially thousands of complaints in a short time--an extraordinary burden considering that the average annual caseload of the ALJs is about 300 cases. E.R. 534. Only after these steps must each alien demonstrate prejudice, such as a defense to the charge or his admissions. These requirements constitute an abuse of discretion especially when the court acknowledged that it is "likely" that some class members will have no defense. See E.R. 471-72.[25]

IV. Defendants Entitled to Summary Judgment.

Defendants also seek reversal of the district court's denial of their motion for summary judgment. E.R. 493-94; 507; see C.R. 97-98. Defendants are entitled to summary judgment as a matter of law on the following claims.

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[24] The injunction requires court approval of 274C notice forms and, thus, is "an improper intrusion by a federal court into the workings of a coordinate branch of the Government." Cf. INS v. Legalization Assistance Project, 114 S. Ct. 422, 424 (1993) (O'Connor, Circuit Justice).

[25] The injunction is even more overbroad where no final order has yet issued because the INS must recharge or conduct notice hearings to issue final orders. E.R. 508. Unless personal service of court-approved forms (and hearing notices) is achieved, the charges are effectively rescinded although the court held that "[f]ailure to request a hearing does not, in and of itself, indicate that a person did not receive adequate notice." E.R. 469, 475. By requiring no prejudice, the court erred.

A. English-Language NIF and NOR/W Satisfy Due Process.

Plaintiffs originally sought revision of the forms and written translation into "Spanish or another major language." E.R. 26. Where a respondent's native language is not "English, Spanish, or another major language" plaintiffs sought a "written certification by the agent . . . that [the forms] have been translated and explained to the person in his native language," whatever that language is. Id. After defendants argued that universal translation into potentially more than 100 languages was not supported by case law and would impose extraordinary burdens on the INS, plaintiffs disavowed this claim. C.R. 98 at 10. Plaintiffs subsequently limited their claim to translation only into Spanish and not into every possible language. C.R. 125 at 16-17, n.14. Yet, the district court denied defendants' motion for summary judgment on this claim.

Also, as explained more fully above, the district court erred as a matter of law in holding that the NIF and NOR/W do not adequately notify individuals of their rights and that the forms must be translated into Spanish. See section I.B. supra. Defendants are entitled to judgment as a matter of law on this claim.[26]

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[26] Because the forms alone satisfy due process, defendants' motion to dismiss should have been granted. C.R. 33. See Carpenters Health and Welfare Trust v. Capital Corp., 25 F.3d 849, 852 (9th Cir. 1994); Figueroa v. United States, 7 F.3d 1405, 1408 (9th Cir. 1993) (question of law reviewed de novo).

B. Plaintiffs Failed to Introduce Evidence of Coercion.

Plaintiffs alleged that INS agents "have coerced and continue to coerce" them into waiving their right to request 274C hearings. E.R. 9. Discovery revealed no evidence that the four named-plaintiffs who executed waivers did so as a result of coercion.

Adames testified that no agent threatened her or used physical or verbal force to make her sign the waiver form. E.R. 136-37. Instead, she signed it because she knew she had presented false documents. E.R. 138.

Walters stated that the agent reviewed the 274C forms with her and her English-speaking husband. E.R. 83-84. No pressure or threats were applied. E.R. 88-91. The agent did not raise his voice, and no one told her that she was compelled to sign the form. E.R. 89. Walters never asked to leave the INS office, or to make a telephone call, or to speak with an attorney. E.R. 90-91. Instead, as Walters admitted, she chose to sign the waiver "because I knew that I did it." E.R. 91.

Leslie Kemm, spouse of named-plaintiff Meziab, said her husband did not feel threatened by INS agents prior to signing the waiver. E.R. 207. She said he executed the waiver to "admit to what he did." E.R. 209.

Santana-Alvarez testified that no physical force or threats were used against him. E.R. 165. He did not ask for counsel. E.R. 257-58.

Thus, even viewing the evidence in the light most favorable to plaintiffs, the claim of coercion is unfounded. There simply is no evidence of coercion. The district court erred as a matter of law by failing to grant summary judgment to defendants on this claim.

C. Regulations do not Provide for Service on Counsel.

Plaintiffs also claimed that the INS violated its regulations when it failed to serve NIFs on counsel where the alleged violators were represented. E.R. 11. The regulations do not require such service, however. "Service of [the NIF] shall be accomplished by personal service pursuant to § 103.5a(a)(2)." 8 C.F.R. § 270.2(d). Section 103.5a(a)(2) provides that personal service is accomplished by "delivery of a copy personally." The only plaintiff making this claim is Cruz-Garcia. It is undisputed that Cruz-Garcia was personally served. E.R. 19. This satisfied the regulations.[27]

In any event, Cruz-Garcia failed to demonstrate that she suffered prejudice because the NIF was not served on her attorney. Florez-de Solis v. INS, 796 F.2d 330, 336 (9th Cir. 1986)(where person claimed that INS did not properly serve attorney with copy of BIA decision, person had to demonstrate prejudice). Cruz-Garcia had sufficient opportunity to consult with her attorney. Indeed, her attorney was at the INS office and drove her back to his office afterward. E.R. 325-27. Her

[27] Even if Cruz-Garcia's claim were valid, this would not justify classwide relief on this issue. See Lewis, 116 S. Ct. at 2184.

attorney failed to review the documents with her because "there were lots and lots of people waiting to see me." E.R. 327. Cruz-Garcia met again with the attorney three days later. E.R. 183.

It is important to note that Cruz-Garcia did not waive her right to a document fraud hearing. E.R. 335. Instead, a final order issued in her case because she and her attorney failed to request a hearing within 60 days. E.R. 189. Because plaintiffs did not offer sufficient evidence, defendants were entitled to summary judgment on this claim.

D. Reopening is Contrary to Statute.

Plaintiffs claimed that the INS must provide a permanent procedure whereby an alien who fails to request a 274C hearing may subsequently move to reopen his 274C final order. E.R. 11. Instead, the court provided a method by which class members may move to reopen their cases. The court did not order that such relief be available to all 274C respondents in the future. Defendants were entitled to summary judgment on plaintiffs' claim that future 274C respondents should be allowed to move to reopen 274C final orders.

The statute and regulations provide that if an alien fails to request an administrative hearing within sixty days, the agency order becomes "final and unappealable." 8 U.S.C. § 1324c(d)(2)(B); 8 C.F.R. §§ 270.2(f) and (g). The plain language of the statute gives plaintiffs no right to "reopening." 8 U.S.C. § 1324c(d)(2)(B).[28]

Indeed, in 1991, the INS amended its regulations to "make it clear" that motions to reopen are not applicable to employer sanctions cases under 8 U.S.C. § 1324a. See 8 C.F.R. § 103.5(a); 56 Fed. Reg. 41768 (1991). The INS explained that the "plain language" of § 1324a dictated this result, given that 8 U.S.C. § 1324a(e)(3)(A) calls for the issuance of a "final and unappealable" order where a hearing is not timely requested. 56 Fed. Reg. 41768. Similarly, the language of 8 U.S.C. § 1324c(d)(2)(B) does not allow "reopening" of 274C cases of final orders of document fraud.[29]

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[28] Applying 8 C.F.R. § 103.5 (dealing with reopening or reconsideration) to 274C would be contrary to the statute and thus impermissible. Cf. Rahim v. McNary, 24 F.3d 440 (2d Cir. 1994) (where Congress did not envision further development of record and individuals were given "full and fair opportunity" to establish eligibility, regulations precluding reopening upheld). Plaintiffs received a fair opportunity. See supra section I.B.

[29] The INS has rescinded a few final 274C orders as a matter of discretion. This provides no basis for arguing that the INS must make reopening available. Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("an agency's decision not to prosecute or enforce is a decision generally committed to an agency's absolute discretion").

Therefore, defendants were entitled to summary judgment on this claim.

CONCLUSION

The Court should reverse the district court's order certifying the class and granting partial summary judgment to plaintiffs. The Court should vacate the permanent injunction and enter summary judgment for defendants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF FORMAT

Pursuant to Ninth Circuit Rule 32(e)(3), I certify that the answering brief is Monospaced, has 10.5 or less characters per inch and contains 13998 words.

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Dated: January 17, 1997

STATEMENT OF RELATED CASES

The following Ninth Circuit cases involve issues relating to 8 U.S.C. § 1324c:

Noriega v. INS, No. 96-70513

Kumar v. INS, No. 96-70300

Aguilera-Valencia v. INS, No. 95-70905

Bravo-Lopez v. INS, No. 95-70110

Cruz-Garcia v. INS, No. 94-70464

Corona-Alvarez v. INS, No. 94-70218

DATED: January 17, 1997

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ADDENDUM

Statutes and Regulations

Section 212, 8 U.S.C. §1182 - General Classes Of Aliens Ineligible To Receive Visas And Excluded From Admission; Waivers Of Inadmissibility

(d)(5)

(A) [1]The Attorney General may, except as provided in subparagraph (B) or in section 214(f), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

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[1] See Public Law 89-732 and Public Law 95-145, for provisions for adjustment of status of Hungarian, Cuban, and Indochinese refugees.

Section 274A, 8 U.S.C. §1324a - Unlawful Employment Of Aliens

(a) Making Employment of Unauthorized Aliens Unlawful. --

(1) In General. It is unlawful for a person or other entity[1] [2]

(A) 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 (as defined in subsection (h)(3)) with respect to such employment, or

(B)

(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) or

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[1] Section 521(a) of the Immigration Act of 1990 (Pub. L. 101-649, Nov. 29, 1990, 104 Stat. 5053) amended this paragraph to eliminate the paperwork requirement for recruiters and referrers, applicable to recruiting and referring occurring on or after November 29, 1990.

[2] Section 8704 of title 46, U.S. Code, added by § 5(f)(1) of the Commercial Fishing Industry Vessel Anti-Reflagging Act of 1987 (Pub. L. 100-239, Jan. 11, 1988) provides as follows:

> Alien deemed to be employed in the United States. An alien is deemed to be employed in the United States for purposes of section 274A of the Immigration and Nationality Act (8 U.S.C. 1324a) if the alien is an unlicensed individual employed on a fishing, fish processing, or fish tender vessel that --
> (1) is a vessel of the United States engaged in the fisheries in the navigable waters of the United States or the exclusive economic zone; and
> (2) is not engaged in fishing exclusively for highly migratory species (as that term is defined in section 3 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802).

Section 5(f)(3) of that Act, 101 Stat. 1781, provides as follows:

> With respect to an alien who is deemed to be employed in the United States under section 8704 of title 46, United States Code (as amended by this subsection), the term {"date of the enactment of this section" as used in section 274A(i) of the Immigration and Nationality Act means the date 180 days after the enactment of this section.

Section 274C, 8 U.S.C. §1324c - Penalties For Document Fraud[1]

(a) Activities Prohibited. It is unlawful for any person or entity knowingly --

(1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this Act,

(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act,

(3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this Act, or

(4) to accept or receive or to provide any document lawfully issued to a person other than the possessor (including a deceased individual) for the purpose of complying with section 274A(b).

(b) Exception. This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under chapter 224 of title 18, United States Code.

(c) Construction. Nothing in this section shall be construed to diminish or qualify any of the penalties available for activities prohibited by this section but proscribed as well in title 18, United States Code.

(d) Enforcement. --

(1) Authority in Investigations. In conducting investigations and hearings under this subsection --

(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated, and

(B) administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing.

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[1] Section 274C was inserted by § 544(a) of the Immigration Act of 1990 (Pub. L. 101-649, Nov. 29, 1990, 104 Stat. 5059), effective for persons or entities that have committed violations on or after November 29, 1990.

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(2) Hearing. --

(A) In General. Before imposing an order described in paragraph (3) against a person or entity under this subsection for a violation of subsection (a), the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of Hearing. Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of title 5, United States Code. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) Issuance of Orders. If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity has violated subsection (a), the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (3).

(3) Cease and Desist Order with Civil Money Penalty. With respect to a violation of subsection (a), the order under this subsection shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of --

(A) not less than $250 and not more than $2000 for each document used, accepted, or created and each instance of use, acceptance, or creation, or

(B) in the case of a person or entity previously subject to an order under this paragraph, not less than $2000 and not more than $5000 for each document used, accepted, or created and each instance of use, acceptance, or creation.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subsections each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(4) Administrative Appellate Review. The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order under this subsection.

(5) Judicial Review. A person or entity adversely affected by a final order under this section may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.

(6) Enforcement of Orders. If a person or entity fails to comply with a final order issued under this section against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

Section 279, 8 U.S.C. §1329 - Jurisdiction Of District Courts

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended. No suit or proceeding for a violation of any of the provisions this subchapter shall be settled, compromised, or discontinued without the consent of the court in which it is pending or any such settlement, compromise, or discontinuance shall be entered of record with the reasons therefor.

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conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense, to be applied in addition to any sentencing enhancement that would otherwise apply pursuant to the calculation of the defendant's criminal history category;

(D) impose an additional appropriate sentencing enhancement upon an offender with 2 or more prior felony convictions arising out of separate and prior prosecutions for offenses that involved the same or similar underlying conduct as the current offense, to be applied in addition to any sentencing enhancement that would otherwise apply pursuant to the calculation of the defendant's criminal history category; and

(E) consider whether any other aggravating or mitigating circumstances warrant upward or downward sentencing adjustments.

(3) EMERGENCY AUTHORITY TO SENTENCING COMMISSION.—The Commission shall promulgate the guidelines or amendments provided for under this subsection as soon as practicable in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that Act had not expired.

(c) EFFECTIVE DATE.—This section and the amendments made by this section shall apply with respect to offenses occurring on or after the date of the enactment of this Act.

SEC. 212. NEW DOCUMENT FRAUD OFFENSES; NEW CIVIL PENALTIES FOR DOCUMENT FRAUD.

(a) ACTIVITIES PROHIBITED.—Section 274C(a) (8 U.S.C. 1324c(a)) is amended—

(1) in paragraph (1), by inserting before the comma at the end the following: "or to obtain a benefit under this Act";

(2) in paragraph (2), by inserting before the comma at the end the following: "or to obtain a benefit under this Act";

(3) in paragraph (3)—

(A) by inserting "or with respect to" after "issued to";

(B) by adding before the comma at the end the following: "or obtaining a benefit under this Act"; and

(C) by striking "or" at the end;

(4) in paragraph (4)—

(A) by inserting "or with respect to" after "issued to";

(B) by adding before the period at the end the following: "or obtaining a benefit under this Act"; and

(C) by striking the period at the end and inserting ", or"; and

(5) by adding at the end the following new paragraphs:

"(5) to prepare, file, or assist another in preparing or filing, any application for benefits under this Act, or any document required under this Act, or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made or, in whole or in part, does not relate to the person on whose behalf it was or is being submitted, or

"(6)(A) to present before boarding a common carrier for the purpose of coming to the United States a document which relates to the alien's eligibility to enter the United States, and (B) to fail to present such document to an immigration officer upon arrival at a United States port of entry.".

(b) DEFINITION OF FALSELY MAKE.—Section 274C (8 U.S.C. 1324c), as amended by section 213 of this division, is further amended by adding at the end the following new subsection:

"(f) FALSELY MAKE.—For purposes of this section, the term 'falsely make' means to prepare or provide an application or document, with knowledge or in reckless disregard of the fact that the application or document contains a false, fictitious, or fraudulent statement or material representation, or has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted.".

(c) CONFORMING AMENDMENT.—Section 274C(d)(3) (8 U.S.C. 1324c(d)(3)) is amended by striking "each document used, accepted, or created and each instance of use, acceptance, or creation" each place it appears and inserting "each document that is the subject of a violation under subsection (a)".

(d) WAIVER BY ATTORNEY GENERAL.—Section 274C(d) (8 U.S.C. 1324c(d)) is amended by adding at the end the following new paragraph:

"(7) WAIVER BY ATTORNEY GENERAL.—The Attorney General may waive the penalties imposed by this section with respect to an alien who knowingly violates subsection (a)(6) if the alien is granted asylum under section 208 or withholding of deportation under section 243(h).".

(e) EFFECTIVE DATE.—Section 274C(f) of the Immigration and Nationality Act, as added by subsection (b), applies to the preparation of applications before, on, or after the date of the enactment of this Act.

SEC. 213. NEW CRIMINAL PENALTIES FOR FAILURE TO DISCLOSE ROLE AS PREPARER OF FALSE APPLICATION FOR IMMIGRATION BENEFITS.

Section 274C (8 U.S.C. 1324c) is amended by adding at the end the following new subsection:

"(e) CRIMINAL PENALTIES FOR FAILURE TO DISCLOSE ROLE AS DOCUMENT PREPARER.—(1) Whoever, in any matter within the jurisdiction of the Service, knowingly and willfully fails to disclose, conceals, or covers up the fact that they have, on behalf of any person and for a fee or other remuneration, prepared or assisted in preparing an application which was falsely made (as defined in subsection (f)) for immigration benefits, shall be fined in accordance with title 18, United States Code, imprisoned for not more than 5 years, or both, and prohibited from preparing or assisting in preparing, whether or not for a fee or other remuneration, any other such application.

"(2) Whoever, having been convicted of a violation of paragraph (1), knowingly and willfully prepares or assists in preparing an application for immigration benefits pursuant to this Act, or the regulations promulgated thereunder, whether or not for a fee or other remuneration and regardless of whether in any matter within the jurisdiction of the Service, shall be fined in accordance with title 18, United States Code, imprisoned for not more than 15 years, or both, and prohibited from preparing or assisting in preparing any other such application.".

SEC. 214. CRIMINAL PENALTY FOR KNOWINGLY PRESENTING DOCUMENT WHICH FAILS TO CONTAIN REASONABLE BASIS IN LAW OR FACT.

The fourth paragraph of section 1546(a) of title 18, United States Code, is amended by striking "containing any such false statement" and inserting "which contains any such false statement or which fails to contain any reasonable basis in law or fact".

SEC. 215. CRIMINAL PENALTY FOR FALSE CLAIM TO CITIZENSHIP.

Section 1015 of title 18, United States Code, is amended—

(1) by striking the dash at the end of paragraph (d) and inserting "; or", and

(2) by inserting after paragraph (d) the following:

"(e) Whoever knowingly makes any false statement or claim that he is, or at any time has been, a citizen or national of the United States, with the intent to obtain on behalf of himself, or any other person, any Federal or State benefit or service, or to engage unlawfully in employment in the United States; or

"(f) Whoever knowingly makes any false statement or claim that he is a citizen of the United States in order to register to vote or to vote in any Federal, State, or local election (including an initiative, recall, or referendum)—".

SEC. 216. CRIMINAL PENALTY FOR VOTING BY ALIENS IN FEDERAL ELECTION.

(a) IN GENERAL.—Title 18, United States Code, is amended by inserting after section 610 the following:

"§611. Voting by aliens

"(a) It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, unless—

"(1) the election is held partly for some other purpose;

"(2) aliens are authorized to vote for such other purpose under a State constitution or statute or a local ordinance; and

"(3) voting for such other purpose is conducted independently of voting for a candidate for such Federal offices, in such a manner that an alien has the opportunity to vote for such other purpose, but not an opportunity to vote for a candidate for any one or more of such Federal offices.

"(b) Any person who violates this section shall be fined under this title, imprisoned not more than one year, or both.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 29 of title 18, United States Code, is amended by inserting after the item relating to section 610 the following new item:

"611. Voting by aliens.".

SEC. 217. CRIMINAL FORFEITURE FOR PASSPORT AND VISA RELATED OFFENSES.

Section 982(a) of title 18, United States Code, is amended by inserting after paragraph (5) the following new paragraph:

"(6)(A) The court, in imposing sentence on a person convicted of a violation of, or conspiracy to violate, section 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title, or a violation of, or conspiracy to violate, section 1028 of this title if committed in connection with passport or visa issuance or use, shall order that the person forfeit to the United States, regardless of any provision of State law—

"(i) any conveyance, including any vessel, vehicle, or aircraft used in the commission of a violation of, or a conspiracy to violate, subsection (a); and

"(ii) any property real or personal—

"(I) that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of a violation of, or a conspiracy to violate, subsection (a), section 274A(a)(1) or 274A(a)(2) of the Immigration and Nationality Act, or section 1028, 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title; or

"(II) that is used to facilitate, or is intended to be used to facilitate, the commission of a violation of, or a conspiracy to violate, subsection (a), section 274A(a)(1) or 274A(a)(2) of the Immigration and Nationality Act, or section 1028, 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title.

The court, in imposing sentence on such person, shall order that the person forfeit to the United States all property described in this subparagraph.

"(B) The criminal forfeiture of property under subparagraph (A), including any seizure and disposition of the property and any related administrative or judicial proceeding, shall be governed by the provisions of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), other than subsections (a) and (d) of such section 413.".

SEC. 218. CRIMINAL PENALTIES FOR INVOLUNTARY SERVITUDE.

(a) AMENDMENTS TO TITLE 18.—Sections 1581, 1583, 1584, and 1588 of title 18, United States Code, are amended by striking "five" each place it appears and inserting "10".

(b) REVIEW OF SENTENCING GUIDELINES.—The United States Sentencing Commission shall ascertain whether there exists an unwarranted disparity—

the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 207, or to have been granted asylum under section 208.

"(D) LIMIT ON COLLATERAL ATTACKS.—In any action brought against an alien under section 275(a) or section 276, the court shall not have jurisdiction to hear any claim attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).

"(E) ASYLUM OFFICER DEFINED.—As used in this paragraph, the term 'asylum officer' means an immigration officer who—

"(i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 208, and

"(ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

"(F) EXCEPTION.—Subparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.

"(2) INSPECTION OF OTHER ALIENS.—

"(A) IN GENERAL.—Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 240.

"(B) EXCEPTION.—Subparagraph (A) shall not apply to an alien—

"(i) who is a crewman,

"(ii) to whom paragraph (1) applies, or

"(iii) who is a stowaway.

"(C) TREATMENT OF ALIENS ARRIVING FROM CONTIGUOUS TERRITORY.—In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 240.

"(3) CHALLENGE OF DECISION.—The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 240.

"(c) REMOVAL OF ALIENS INADMISSIBLE ON SECURITY AND RELATED GROUNDS.—

"(1) REMOVAL WITHOUT FURTHER HEARING.—If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 212(a)(3), the officer or judge shall—

"(A) order the alien removed, subject to review under paragraph (2);

"(B) report the order of removal to the Attorney General; and

"(C) not conduct any further inquiry or hearing until ordered by the Attorney General.

"(2) REVIEW OF ORDER.—(A) The Attorney General shall review orders issued under paragraph (1).

"(B) If the Attorney General—

"(i) is satisfied on the basis of confidential information that the alien is inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 212(a)(3), and

"(ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security,

the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.

"(C) If the Attorney General does not order the removal of the alien under subparagraph (B), the Attorney General shall specify the further inquiry or hearing that shall be conducted in the case.

"(3) SUBMISSION OF STATEMENT AND INFORMATION.—The alien or the alien's representative may submit a written statement and additional information for consideration by the Attorney General.

"(d) AUTHORITY RELATING TO INSPECTIONS.—

"(1) AUTHORITY TO SEARCH CONVEYANCES.—Immigration officers are authorized to board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States.

"(2) AUTHORITY TO ORDER DETENTION AND DELIVERY OF ARRIVING ALIENS.—Immigration officers are authorized to order an owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States—

"(A) to detain the alien on the vessel or at the airport of arrival, and

"(B) to deliver the alien to an immigration officer for inspection or to a medical officer for examination.

"(3) ADMINISTRATION OF OATH AND CONSIDERATION OF EVIDENCE.—The Attorney General and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service.

"(4) SUBPOENA AUTHORITY.—(A) The Attorney General and any immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States.

"(B) Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer may, in the event of neglect or refusal to respond to a subpoena issued under this paragraph or refusal to testify before an immigration officer, issue an order requiring such persons to appear before an immigration officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.".

(b) GAO STUDY ON OPERATION OF EXPEDITED REMOVAL PROCEDURES.—

(1) STUDY.—The Comptroller General shall conduct a study on the implementation of the expedited removal procedures under section 235(b)(1) of the Immigration and Nationality Act, as amended by subsection (a). The study shall examine—

(A) the effectiveness of such procedures in deterring illegal entry,

(B) the detention and adjudication resources saved as a result of the procedures,

(C) the administrative and other costs expended to comply with th[illegible] [illegible],

(D) the effectivene[illegible] [illegible] such procedures in processing asylum c[illegible] by undocumented aliens who assert a fear of persecution, including the accuracy of credible fear determinations, and

(E) the cooperation of other countries and air carriers in accepting and returning aliens removed under such procedures.

(2) REPORT.—By not later than 18 months after the date of the enactment of this Act, the Comptroller General shall submit to the Committees on the Judiciary of the House of Representatives and the Senate a report on the study conducted under paragraph (1).

SEC. 303. APPREHENSION AND DETENTION OF ALIENS (REVISED SECTION 236).

(a) IN GENERAL.—Section 236 (8 U.S.C. 1226) is amended to read as follows:

"APPREHENSION AND DETENTION OF ALIENS

"SEC. 236. (a) ARREST, DETENTION, AND RELEASE.—On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

"(1) may continue to detain the arrested alien; and

"(2) may release the alien on—

"(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

"(B) conditional parole; but

"(3) may not provide the alien with work authorization (including an 'employment authorized' endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

"(b) REVOCATION OF BOND OR PAROLE.—The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

"(c) DETENTION OF CRIMINAL ALIENS.—

"(1) CUSTODY.—The Attorney General shall take into custody any alien who—

"(A) is inadmissible by reason of having committed any offense covered in section 212(a)(2),

"(B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),

"(C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or

"(D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B),

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

"(2) RELEASE.—The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18, United States Code, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

"(d) IDENTIFICATION OF CRIMINAL ALIENS.—(1) The Attorney General shall devise and implement a system—

"(A) to make available, daily (on a 24-hour basis), to Fed[illegible]al, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

"(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

"(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

"(2) The record under paragraph (1)(C) shall be made available—

"(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

"(B) to officials of the Department of State for use in its automated visa lookout system.

"(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

"(e) JUDICIAL REVIEW.—The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.".

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendment made by subsection (a) shall become effective on the title III-A effective date.

(2) NOTIFICATION REGARDING CUSTODY.—If the Attorney General, not later than 10 days after the date of the enactment of this Act, notifies in writing the Committees on the Judiciary of the House of Representatives and the Senate that there is insufficient detention space and Immigration and Naturalization Service personnel available to carry out section 236(c) of the Immigration and Nationality Act, as amended by subsection (a), or the amendments made by section 440(c) of Public Law 104-132, the provisions in paragraph (3) shall be in effect for a 1-year period beginning on the date of such notification, instead of such section or such amendments. The Attorney General may extend such 1-year period for an additional year if the Attorney General provides the same notice not later than 10 days before the end of the first 1-year period. After the end of such 1-year or 2-year periods, the provisions of such section 236(c) shall apply to individuals released after such periods.

(3) TRANSITION PERIOD CUSTODY RULES.—

(A) IN GENERAL.—During the period in which this paragraph is in effect pursuant to paragraph (2), the Attorney General shall take into custody any alien who—

(i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, as amended by section 321 of this division),

(ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act,

(iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act (before redesignation under this subtitle), or

(iv) is inadmissible under section 212(a)(3)(B) of such Act or deportable under section 241(a)(4)(B) of such Act (before redesignation under this subtitle),

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(B) RELEASE.—The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and—

(i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

SEC. 304. REMOVAL PROCEEDINGS; CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS; VOLUNTARY DEPARTURE (REVISED AND NEW SECTIONS 239 TO 240C).

(a) IN GENERAL.—Chapter 4 of title II is amended—

(1) by redesignating section 239 (8 U.S.C. 1229) as section 234 and by moving such section to immediately follow section 233;

(2) by redesignating section 240 (8 U.S.C. 1230) as section 240C; and

(3) by inserting after section 238 the following new sections:

"INITIATION OF REMOVAL PROCEEDINGS

"SEC. 239. (a) NOTICE TO APPEAR.—

"(1) IN GENERAL.—In removal proceedings under section 240, written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying the following:

"(A) The nature of the proceedings against the alien.

"(B) The legal authority under which the proceedings are conducted.

"(C) The acts or conduct alleged to be in violation of law.

"(D) The charges against the alien and the statutory provisions alleged to have been violated.

"(E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel under subsection (b)(1) and (ii) a current list of counsel prepared under subsection (b)(2).

"(F)(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 240.

"(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien's address or telephone number.

"(iii) The consequences under section 240(b)(5) of failure to provide address and telephone information pursuant to this subparagraph.

"(G)(i) The time and place at which the proceedings will be held.

"(ii) The consequences under section 240(b)(5) of the failure, except under exceptional circumstances, to appear at such proceedings.

"(2) NOTICE OF CHANGE IN TIME OR PLACE OF PROCEEDINGS.—

"(A) IN GENERAL.—In removal proceedings under section 240, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien's counsel of record, if any) specifying—

"(i) the new time or place of the proceedings, and

"(ii) the consequences under section 240(b)(5) of failing, except under exceptional circumstances, to attend such proceedings.

"(B) EXCEPTION.—In the case of an alien not in detention, a written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F).

"(3) CENTRAL ADDRESS FILES.—The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

"(b) SECURING OF COUNSEL.—

"(1) IN GENERAL.—In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 240, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

"(2) CURRENT LISTS OF COUNSEL.—The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 240. Such lists shall be provided under subsection (a)(1)(E) and otherwise made generally available.

"(3) RULE OF CONSTRUCTION.—Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 240 if the time period described in paragraph (1) has elapsed and the alien has failed to secure counsel.

"(c) SERVICE BY MAIL.—Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F).

"(d) PROMPT INITIATION OF REMOVAL.—(1) In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall begin any removal proceeding as expeditiously as possible after the date of the conviction.

"(2) Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

"REMOVAL PROCEEDINGS

"SEC. 240. (a) PROCEEDING.—

"(1) IN GENERAL.—An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

"(2) CHARGES.—An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 212(a) or any applicable ground of deportability under section 237(a).

"(3) EXCLUSIVE PROCEDURES.—Unless otherwise specified in this Act, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 238.

"(b) CONDUCT OF PROCEEDING.—

"(1) AUTHORITY OF IMMIGRATION JUDGE.—The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this Act.

"(2) FORM OF PROCEEDING.—

"(A) IN GENERAL.—The proceeding may take place—

"(i) in person,

"(ii) where agreed to by the parties, in the absence of the alien,

"(iii) through video conference, or

"(iv) subject to subparagraph (B), through telephone conference.

"(B) CONSENT REQUIRED IN CERTAIN CASES.—An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.

"(3) PRESENCE OF ALIEN.—If it is impracticable by reason of an alien's mental incompetency

In the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien to the port of removal shall be at the expense of the appropriation for the enforcement of this Act.

"(3) COSTS OF REMOVAL FROM PORT OF REMOVAL FOR ALIENS ADMITTED OR PERMITTED TO LAND.—

"(A) THROUGH APPROPRIATION.—Except as provided in subparagraph (B), in the case of an alien who has been admitted or permitted to land and is ordered removed, the cost (if any) of removal of the alien from the port of removal shall be at the expense of the appropriation for the enforcement of this Act.

"(B) THROUGH OWNER.—

"(i) IN GENERAL.—In the case of an alien described in clause (ii), the cost of removal of the alien from the port of removal may be charged to any owner of the vessel, aircraft, or other transportation line by which the alien came to the United States.

"(ii) ALIENS DESCRIBED.—An alien described in this clause is an alien who—

"(I) is admitted to the United States (other than lawfully admitted for permanent residence) and is ordered removed within 5 years of the date of admission based on a ground that existed before or at the time of admission, or

"(II) is an alien crewman permitted to land temporarily under section 252 and is ordered removed within 5 years of the date of landing.

"(C) COSTS OF REMOVAL OF CERTAIN ALIENS GRANTED VOLUNTARY DEPARTURE.—In the case of an alien who has been granted voluntary departure under section 240B and who is financially unable to depart at the alien's own expense and whose removal the Attorney General deems to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

"(f) ALIENS REQUIRING PERSONAL CARE DURING REMOVAL.—

"(1) IN GENERAL.—If the Attorney General believes that an alien being removed requires personal care because of the alien's mental or physical condition, the Attorney General may employ a suitable person for that purpose who shall accompany and care for the alien until the alien arrives at the final destination.

"(2) COSTS.—The costs of providing the service described in paragraph (1) shall be defrayed in the same manner as the expense of removing the accompanied alien is defrayed under this section.

"(g) PLACES OF DETENTION.—

"(1) IN GENERAL.—The Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal. When United States Government facilities are unavailable or facilities adapted or suitably located for detention are unavailable for rental, the Attorney General may expend from the appropriation 'Immigration and Naturalization Service—Salaries and Expenses', without regard to section 3709 of the Revised Statutes (41 U.S.C. 5), amounts necessary to acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention.

"(2) DETENTION FACILITIES OF THE IMMIGRATION AND NATURALIZATION SERVICE.—Prior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use.

"(h) STATUTORY CONSTRUCTION.—Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.".

(b) REENTRY OF ALIEN REMOVED PRIOR TO COMPLETION OF TERM OF IMPRISONMENT.—Section 276(b) (8 U.S.C. 1326(b)), as amended by section 321(b) of this division, is amended—

(1) by striking "or" at the end of paragraph (2),

(2) by adding "or" at the end of paragraph (3), and

(3) by inserting after paragraph (3) the following new paragraph:

"(4) who was removed from the United States pursuant to section 241(a)(4)(B) who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, United States Code, imprisoned for not more than 10 years, or both.".

(c) MISCELLANEOUS CONFORMING AMENDMENT.—Section 212(a)(4) (8 U.S.C. 1182(a)(4)), as amended by section 621(a) of this division, is amended by striking "241(a)(5)(B)" each place it appears and inserting "237(a)(5)(B)".

SEC. 306. APPEALS FROM ORDERS OF REMOVAL. (NEW SECTION 242).

(a) IN GENERAL.—Section 242 (8 U.S.C. 1252) is amended—

(1) by redesignating subsection (j) as subsection (i) and by moving such subsection and adding it at the end of section 241, as inserted by section 305(a)(3) of this division; and

(2) by amending the remainder of section 242 to read as follows:

"JUDICIAL REVIEW OF ORDERS OF REMOVAL

"SEC. 242. (a) APPLICABLE PROVISIONS.—

"(1) GENERAL ORDERS OF REMOVAL.—Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 235(b)(1)) is governed only by chapter 158 of title 28 of the United States Code, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

"(2) MATTERS NOT SUBJECT TO JUDICIAL REVIEW.—

"(A) REVIEW RELATING TO SECTION 235(b)(1).—Notwithstanding any other provision of law, no court shall have jurisdiction to review—

"(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 235(b)(1),

"(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

"(iii) the application of such section to individual aliens, including the determination made under section 235(b)(1)(B), or

"(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 235(b)(1).

"(B) DENIALS OF DISCRETIONARY RELIEF.—Notwithstanding any other provision of law, no court shall have jurisdiction to review—

"(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or

"(ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a).

"(C) ORDERS AGAINST CRIMINAL ALIENS.—Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i).

"(3) TREATMENT OF CERTAIN DECISIONS.—No alien shall have a right to appeal from a decision of an immigration judge [illegible] solely on a certification described in section 240(c)(1)(B).

"(b) REQUIREMENTS FOR REVIEW OF ORDERS OF REMOVAL.—With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

"(1) DEADLINE.—The petition for review must be filed not later than 30 days after the date of the final order of removal.

"(2) VENUE AND FORMS.—The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

"(3) SERVICE.—

"(A) IN GENERAL.—The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 240 was entered.

"(B) STAY OF ORDER.—Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

"(C) ALIEN'S BRIEF.—The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

"(4) SCOPE AND STANDARD FOR REVIEW.—Except as provided in paragraph (5)(B)—

"(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

"(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

"(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

"(D) the Attorney General's discretionary judgment whether to grant relief under section 208(a) shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

"(5) TREATMENT OF NATIONALITY CLAIMS.—

"(A) COURT DETERMINATION IF NO ISSUE OF FACT.—If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

"(B) TRANSFER IF ISSUE OF FACT.—If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28, United States Code.

"(C) LIMITATION ON DETERMINATION.—The petitioner may have such nationality claim decided only as provided in this paragraph.

"(6) CONSOLIDATION WITH REVIEW OF MOTIONS TO REOPEN OR RECONSIDER.—When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

"(7) CHALLENGE TO VALIDITY OF ORDERS IN CERTAIN CRIMINAL PROCEEDINGS.—

"(A) IN GENERAL.—If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 243(a) may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

"(B) CLAIMS OF UNITED STATES NATIONALITY.—If the defendant claims in the motion to be a national of the United States and the district court finds that—

"(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

"(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28, United States Code.

The defendant may have such nationality claim decided only as provided in this subparagraph.

"(C) CONSEQUENCE OF INVALIDATION.—If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 243(a). The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

"(D) LIMITATION ON FILING PETITIONS FOR REVIEW.—The defendant in a criminal proceeding under section 243(a) may not file a petition for review under subsection (a) during the criminal proceeding.

"(8) CONSTRUCTION.—This subsection—

"(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 241(a);

"(B) does not relieve the alien from complying with section 241(a)(4) and section 243(g); and

"(C) does not require the Attorney General to defer removal of the alien.

"(9) CONSOLIDATION OF QUESTIONS FOR JUDICIAL REVIEW.—Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.

"(c) REQUIREMENTS FOR PETITION.—A petition for review or for habeas corpus of an order of removal—

"(1) shall attach a copy of such order, and

"(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

"(d) REVIEW OF FINAL ORDERS.—A court may review a final order of removal only if—

"(1) the alien has exhausted all administrative remedies available to the alien as of right, and

"(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

"(e) JUDICIAL REVIEW OF ORDERS UNDER SECTION 235(b)(1).—

"(1) LIMITATIONS ON RELIEF.—Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

"(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 235(b)(1) except as specifically authorized in a subsequent paragraph of this subsection, or

"(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

"(2) HABEAS CORPUS PROCEEDINGS.—Judicial review of any determination made under section 235(b)(1) is available in habeas corpus proceedings, but shall be limited to determinations of—

"(A) whether the petitioner is an alien,

"(B) whether the petitioner was ordered removed under such section, and

"(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 207, or has been granted asylum under section 208, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 235(b)(1)(C).

"(3) CHALLENGES ON VALIDITY OF THE SYSTEM.—

"(A) IN GENERAL.—Judicial review of determinations under section 235(b) and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

"(i) whether such section, or any regulation issued to implement such section, is constitutional; or

"(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this title or is otherwise in violation of law.

"(B) DEADLINES FOR BRINGING ACTIONS.—Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

"(C) NOTICE OF APPEAL.—A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

"(D) EXPEDITIOUS CONSIDERATION OF CASES.—It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

"(4) DECISION.—In any case where the court determines that the petitioner—

"(A) is an alien who was not ordered removed under section 235(b)(1), or

"(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 207, or has been granted asylum under section 208,

the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 240. Any alien who is provided a hearing under section 240 pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

"(5) SCOPE OF INQUIRY.—In determining whether an alien has been ordered removed under section 235(b)(1), the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

"(f) LIMIT ON INJUNCTIVE RELIEF.—

(1) IN GENERAL.—Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.

(2) PARTICULAR CASES.—Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

"(g) EXCLUSIVE JURISDICTION.—Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.".

(b) REPEAL OF SECTION 106.—Section 106 (8 U.S.C. 1105a) is repealed.

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply to all final orders of deportation or removal and motions to reopen filed on or after the date of the enactment of this Act and subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

(2) LIMITATION.—Paragraph (1) shall not be considered to invalidate or to require the reconsideration of any judgment or order entered under section 106 of the Immigration and Nationality Act, as amended by section 440 of Public Law 104–132.

(d) TECHNICAL AMENDMENT.—Effective as if included in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104–132), subsections (a), (c), (d), (g), and (h) of section 440 of such Act are amended by striking "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" and inserting "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)".

SEC. 307. PENALTIES RELATING TO REMOVAL (REVISED SECTION 243).

(a) IN GENERAL.—Section 243 (8 U.S.C. 1253) is amended to read as follows:

"PENALTIES RELATED TO REMOVAL

"SEC. 243. (a) PENALTY FOR FAILURE TO DEPART.—

"(1) IN GENERAL.—Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 237(a), who—

"(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

"(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

"(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

"(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order,

shall be fined under title 18, United States Code, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 237(a)), or both.

"(2) EXCEPTION.—It is not a violation of paragraph (1) to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of

"(3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to applications for immigrant visas or for adjustment of status filed after September 30, 1996.

SEC. 342. INCITEMENT OF TERRORIST ACTIVITY AND PROVISION OF FALSE DOCUMENTATION TO TERRORISTS AS A BASIS FOR EXCLUSION FROM THE UNITED STATES.

(a) IN GENERAL.—Section 212(a)(3)(B) (8 U.S.C. 1182(a)(3)(B)) is amended—

(1) by redesignating subclauses (III) and (IV) of clause (i) as subclauses (IV) and (V), respectively;

(2) by inserting after subclause (II) of clause (i) the following new subclause:

"(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity,"; and

(3) in clause (iii)(III), by inserting "documentation or" before "identification".

(b) EFFECTIVE DATE.—The amendments made by subsection (a) shall take effect on the date of the enactment of this Act and shall apply to incitement regardless of when it occurs.

SEC. 343. CERTIFICATION REQUIREMENTS FOR FOREIGN HEALTH-CARE WORKERS.

Section 212(a)(5) (8 U.S.C. 1182(a)(5)) is amended—

(1) by redesignating subparagraph (C) as subparagraph (D), and

(2) by inserting after subparagraph (B) the following new subparagraph:

"(C) UNCERTIFIED FOREIGN HEALTH-CARE WORKERS.—Any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is excludable unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services, verifying that—

"(i) the alien's education, training, license, and experience—

"(I) meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application;

"(II) are comparable with that required for an American health-care worker of the same type; and

"(III) are authentic and, in the case of a license, unencumbered;

"(ii) the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate for health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write; and

"(iii) if a majority of States licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, the alien has passed such a test or has passed such an examination.

For purposes of clause (ii), determination of the standardized tests required and of the minimum scores that are appropriate are within the sole discretion of the Secretary of Health and Human Services and are not subject to further administrative or judicial review.".

SEC. 344. REMOVAL OF ALIENS FALSELY CLAIMING UNITED STATES CITIZENSHIP.

(a) EXCLUSION OF ALIENS WHO HAVE FALSELY CLAIMED UNITED STATES CITIZENSHIP.—Section 212(a)(6)(C) (8 U.S.C. 1182(a)(6)(C)) is amended—

(1) by redesignating clause (ii) as clause (iii), and

(2) by inserting after clause (i) the following new clause:

"(ii) FALSELY CLAIMING CITIZENSHIP.—Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is excludable.".

(b) DEPORTATION OF ALIENS WHO HAVE FALSELY CLAIMED UNITED STATES CITIZENSHIP.—Section 241(a)(3) (8 U.S.C. 1251(a)(3)) is amended by adding at the end the following new subparagraph:

"(D) FALSELY CLAIMING CITIZENSHIP.—Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any Federal or State law is deportable.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to representations made on or after the date of the enactment of this Act.

SEC. 345. WAIVER OF EXCLUSION AND DEPORTATION GROUND FOR CERTAIN SECTION 274C VIOLATORS.

(a) EXCLUSION GROUNDS.—Section 212 (8 U.S.C. 1182) is amended—

(1) by amending subparagraph (F) of subsection (a)(6) to read as follows:

"(F) SUBJECT OF CIVIL PENALTY.—

"(i) IN GENERAL.—An alien who is the subject of a final order for violation of section 274C is inadmissible.

"(ii) WAIVER AUTHORIZED.—For provision authorizing waiver of clause (i), see subsection (d)(12)."; and

(2) by adding at the end of subsection (d) the following new paragraph:

"(12) The Attorney General may, in the discretion of the Attorney General for humanitarian purposes or to assure family unity, waive application of clause (i) of subsection (a)(6)(F)—

"(A) in the case of an alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation or removal and who is otherwise admissible to the United States as a returning resident under section 211(b), and

"(B) in the case of an alien seeking admission or adjustment of status under section 201(b)(2)(A) or under section 203(a),

if no previous civil money penalty was imposed against the alien under section 274C and the offense was committed solely to assist, aid, or support the alien's spouse or child (and not another individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this paragraph.".

(b) GROUND OF DEPORTATION.—Subparagraph (C) of section 241(a)(3) (8 U.S.C. 1251(a)(3)), before redesignation by section 305(a)(2) of this division, is amended to read as follows:

"(C) DOCUMENT FRAUD.—

"(i) IN GENERAL.—An alien who is the subject of a final order for violation of section 274C is deportable.

"(ii) WAIVER AUTHORIZED.—The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under section 274C and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.".

SEC. 346. INADMISSIBILITY OF CERTAIN STUDENT VISA ABUSERS.

(a) IN GENERAL.—Section 212(a)(6) (8 U.S.C. 1182(a)(6)) is amended by adding at the end the following new subparagraph:

"(G) STUDENT VISA ABUSERS.—An alien who obtains the status of a nonimmigrant under section 101(a)(15)(F)(i) and who violates a term or condition of such status under section 214(l) is excludable until the alien has been outside the United States for a continuous period of 5 years after the date of the violation.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to aliens who obtain the status of a nonimmigrant under section 101(a)(15)(F) of the Immigration and Nationality Act after the end of the 60-day period beginning on the date of the enactment of this Act, including aliens whose status as such a nonimmigrant is extended after the end of such period.

SEC. 347. REMOVAL OF ALIENS WHO HAVE UNLAWFULLY VOTED.

(a) EXCLUSION OF ALIENS WHO HAVE UNLAWFULLY VOTED.—Section 212(a)(10) (8 U.S.C. 1182(a)(10)), as redesignated by section 301(b) of this division, is amended by adding at the end the following new subparagraph:

"(D) UNLAWFUL VOTERS.—Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is excludable.".

(b) DEPORTATION OF ALIENS WHO HAVE UNLAWFULLY VOTED.—Section 241(a) (8 U.S.C. 1251(a)), before redesignation by section 305(a)(2) of this division, is amended by adding at the end the following new paragraph:

"(6) UNLAWFUL VOTERS.—Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to voting occurring before, on, or after the date of the enactment of this Act.

SEC. 348. WAIVERS FOR IMMIGRANTS CONVICTED OF CRIMES.

(a) IN GENERAL.—Section 212(h) (8 U.S.C. 1182(h)) is amended by adding at the end the following: "No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall be effective on the date of the enactment of this Act and shall apply in the case of any alien who is in exclusion or deportation proceedings as of such date unless a final administrative order in such proceedings has been entered as of such date.

SEC. 349. WAIVER OF MISREPRESENTATION GROUND OF INADMISSIBILITY FOR CERTAIN ALIEN.

Subsection (i) of section 212 (8 U.S.C. 1182) is amended to read as follows:

"(i)(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

"(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).".

SEC. 350. OFFENSES OF DOMESTIC VIOLENCE AND STALKING AS GROUND FOR DEPORTATION.

(a) IN GENERAL.—Section 241(a)(2) (8 U.S.C. 1251(a)(2)) is amended by adding at the end the following:

"(ii) in the case of any individual receiving assistance on the date of enactment of the Use of Assisted Housing by Aliens Act of 1996, may not delay, deny, reduce, or terminate the eligibility of that individual for financial assistance on the basis of the immigration status of that individual until the expiration of that 30-day period; and

"(iii) in the case of any individual applying for financial assistance on or after the date of enactment of the Use of Assisted Housing by Aliens Act of 1996, may not deny the application for such assistance on the basis of the immigration status of that individual until the expiration of that 30-day period; and"; and

(C) in subparagraph (B), by striking clause (ii) and inserting the following:

"(ii) pending such verification or appeal, the Secretary may not—

"(I) in the case of any individual receiving assistance on the date of enactment of the Use of Assisted Housing by Aliens Act of 1996, delay, deny, reduce, or terminate the eligibility of that individual for financial assistance on the basis of the immigration status of that individual; and

"(II) in the case of any individual applying for financial assistance on or after the date of enactment of the Use of Assisted Housing by Aliens Act of 1996, deny the application for such assistance on the basis of the immigration status of that individual; and";

(5) in paragraph (5), by striking "status—" and all that follows through the end of the paragraph and inserting the following: "status, the Secretary shall—

"(A) deny the application of that individual for financial assistance or terminate the eligibility of that individual for financial assistance, as applicable;

"(B) provide that the individual may request a fair hearing during the 30-day period beginning upon receipt of the notice under subparagraph (C); and

"(C) provide to the individual written notice of the determination under this paragraph, the right to a fair hearing process, and the time limitation for requesting a hearing under subparagraph (C).", and

(6) by striking paragraph (6) and inserting the following:

"(6) The Secretary shall terminate the eligibility for financial assistance of an individual and the members of the household of the individual, for a period of not less than 24 months, upon determining that such individual has knowingly permitted another individual who is not eligible for such assistance to reside in the public or assisted housing unit of the individual. This provision shall not apply to a family if the ineligibility of the ineligible individual at issue was considered in calculating any proration of assistance provided for the family.".

SEC. 578. PROHIBITION OF SANCTIONS AGAINST ENTITIES MAKING FINANCIAL ASSISTANCE ELIGIBILITY DETERMINATIONS.

Section 214(e) of the Housing and Community Development Act of 1980 (42 U.S.C. 1436a(e)) is amended—

(1) in paragraph (2), by adding "or" at the end;

(2) in paragraph (3), by adding at the end the following: "the response from the Immigration and Naturalization Service to the appeal of that individual.", and

(3) by striking paragraph (4).

SEC. 579. ELIGIBILITY FOR PUBLIC AND ASSISTED HOUSING.

Section 214 of the Housing and Community Development Act of 1980 (42 U.S.C. 1436a) is amended by adding at the end the following new subsection:

"(h) VERIFICATION OF ELIGIBILITY.—

"(1) IN GENERAL.—Except in the case of an election under paragraph (2)(A), no individual or family applying for financial assistance may receive such financial assistance prior to the affirmative establishment and verification of eligibility of at least the individual or one family member under this section by the Secretary or other appropriate entity.

"(2) RULES APPLICABLE TO PUBLIC HOUSING AGENCIES.—A public housing agency (as that term is defined in section 3 of the United States Housing Act of 1937)—

"(A) may elect not to comply with this section; and

"(B) in complying with this section—

"(i) may initiate procedures to affirmatively establish or verify the eligibility of an individual or family under this section at any time at which the public housing agency determines that such eligibility is in question, regardless of whether or not that individual or family is at or near the top of the waiting list of the public housing agency;

"(ii) may affirmatively establish or verify the eligibility of an individual or family under this section in accordance with the procedures set forth in section 274A(b)(1) of the Immigration and Nationality Act; and

"(iii) shall have access to any relevant information contained in the SAVE system (or any successor thereto) that relates to any individual or family applying for financial assistance.

"(3) ELIGIBILITY OF FAMILIES.—For purposes of this subsection, with respect to a family, the term 'eligibility' means the eligibility of each family member.".

SEC. 577. REGULATIONS.

(a) ISSUANCE.—Not later than the 60 days after the date of enactment of this Act, the Secretary of Housing and Urban Development shall issue any regulations necessary to implement the amendments made by this part. Such regulations shall be issued in the form of an interim final rule, which shall take effect upon issuance and shall not be subject to the provisions of section 533 of title 5, United States Code, regarding notice or opportunity for comment.

(b) FAILURE TO ISSUE.—If the Secretary fails to issue the regulations required under subsection (a) before the date specified in that subsection, the regulations relating to restrictions on assistance to noncitizens, contained in the final rule issued by the Secretary of Housing and Urban Development in RIN-2501-AA63 (Docket No. R-95-1409; FR-2383-F-050), published in the Federal Register on March 20, 1995 (Vol. 60, No. 53; pp. 14824–14861), shall not apply after that date.

Subtitle F—General Provisions

SEC. 591. EFFECTIVE DATES.

Except as provided in this title, this title and the amendments made by this title shall take effect on the date of the enactment of this Act.

SEC. 592. NOT APPLICABLE TO FOREIGN ASSISTANCE.

This title does not apply to any Federal, State, or local governmental program, assistance, or benefits provided to an alien under any program of foreign assistance as determined by the Secretary of State in consultation with the Attorney General.

SEC. 593. NOTIFICATION.

(a) IN GENERAL.—Each agency of the Federal Government or a State or political subdivision that administers a program affected by the provisions of this title, shall, directly or through the States, provide general notification to the public and to program recipients of the changes regarding eligibility for any such program pursuant to this title.

(b) FAILURE TO GIVE NOTICE.—Nothing in this section shall be construed to require or authorize continuation of eligibility if the notice under this section is not provided.

SEC. 594. DEFINITIONS.

Except as otherwise provided in this title, for purposes of this title—

(1) the terms "alien", "Attorney General", "national", "naturalization", "State", and "United States" shall have the meaning given such terms in section 101(a) of the Immigration and Nationality Act; and

(2) the term "child" shall have the meaning given such term in section 101(c) of the Immigration and Nationality Act.

TITLE VI—MISCELLANEOUS PROVISIONS

Subtitle A—Refugees, Parole, and Asylum

SEC. 601. PERSECUTION FOR RESISTANCE TO COERCIVE POPULATION CONTROL METHODS.

(a) DEFINITION OF REFUGEE.—

(1) Section 101(a)(42) (8 U.S.C. 1101(a)(42)) is amended by adding at the end the following: "For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.".

(2) Not later than 90 days after the end of each fiscal year, the Attorney General shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate describing the number and countries of origin of aliens granted refugee status or asylum under determinations pursuant to the amendment made by paragraph (1). Each such report shall also contain projections regarding the number and countries of origin of aliens that are likely to be granted refugee status or asylum for the subsequent 2 fiscal years.

(b) NUMERICAL LIMITATION.—Section 207(a) (8 U.S.C. 1157(a)) is amended by adding at the end the following new paragraph:

"(5) For any fiscal year, not more than a total of 1,000 refugees may be admitted under this subsection or granted asylum under section 208 pursuant to a determination under the third sentence of section 101(a)(42) (relating to persecution for resistance to coercive population control methods).".

SEC. 602. LIMITATION ON USE OF PAROLE.

(a) PAROLE AUTHORITY.—Section 212(d)(5)(A) (8 U.S.C. 1182(d)(5)) is amended by striking "for emergent reasons or for reasons deemed strictly in the public interest" and inserting "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit".

(b) REPORT TO CONGRESS.—Not later than 90 days after the end of each fiscal year, the Attorney General shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate describing the number and categories of aliens paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act. Each such report shall provide the total number of aliens paroled into and residing in the United States and shall contain information and data for each country of origin concerning the number and categories of aliens paroled, the duration of parole, the current status of aliens paroled, and the number and categories of aliens returned to the custody from which they were paroled during the preceding fiscal year.

SEC. 603. TREATMENT OF LONG-TERM PAROLEES IN APPLYING WORLDWIDE NUMERICAL LIMITATIONS.

Section 201(c) (8 U.S.C. 1151(c)) is amended—

(1) by amending paragraph (1)(A)(ii) to read as follows:

"(ii) the sum of the number computed under paragraph (2) and the number computed under paragraph (4), plus", and

(2) by adding at the end the following new paragraphs:

"(4) The number computed under this paragraph for a fiscal year (beginning with fiscal gional Processing Facility director or the district director may, in accordance with paragraph (a) of this section, certify a decision to the Associate Commissioner, Examinations (Administrative Appeals Unit) (the appellate authority designated in § 103.1(f)(2)) of this part, when the case involves an unusually complex or novel question of law or fact.

[41 FR 27313, July 2, 1976; 48 FR 43161, Sept. 22, 1983; 52 FR 661, Jan. 8, 1987; 52 FR 16193, May 1, 1987; 53 FR 43985, Oct. 31, 1988; 55 FR 20770, May 21, 1990]

§ 103.5 Reopening or reconsideration.

(a) **Motions to reopen or reconsider in other than special agricultural worker and legalization cases.—(1) When filed by affected party.—(i) General.** Except where the Board has jurisdiction and as otherwise provided in 8 CFR parts 210, 242, or 245a, when the affected party files a motion, the official having jurisdiction may, for proper cause shown, reopen the proceeding, or reconsider the prior decision. Motions to reopen or reconsider are not applicable to proceedings described in § 274a.9 of this chapter. Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

(ii) **Jurisdiction.** The official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction. In that instance, the new official having jurisdiction is the official over such a proceeding in the new geographical locations.

(iii) **Filing Requirements**—A motion shall be submitted on Form I-290A and may be accompanied by a brief.

(A) In writing and signed by the affected party or the attorney or representative of record, if any;

(B) In triplicate if addressed to the Board, in duplicate if addressed to an immigration judge, without any copies if addressed to a Service officer;

(C) Accompanied by a nonrefundable fee as set forth in § 103.7;

(D) Accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding;

(E) Addressed to the official having jurisdiction; and

(F) Submitted to the office maintaining the record upon which the unfavorable decision was made for forwarding to the official having jurisdiction.

(iv) **Effect of motion or subsequent application or petition.** Unless the Service directs otherwise, the filing of a motion to reopen or reconsider or of a subsequent application or petition does not stay the execution of any decision in a case or extend a previously set departure date.

(2) **Requirements for motion to reopen.** A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

(i) The requested evidence was not material to the issue of eligibility;

(ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or

(iii) The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

(3) **Requirements for motion to reconsider.** A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on a incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

(4) **Processing motions in proceedings before the Service.** A motion that does not meet applicable requirements shall be dismissed. Where a motion to reopen is granted, the proceeding shall be reopened. The notice and any favorable decision may be combined.

(5) **Motion by Service officer.—**

(i) **Service motion with decision favorable to affected party.** When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision in order to make a new decision favorable to the affected party, the Service officer shall combine the motion and the favorable decision in one action.

(ii) **Service motion with decision that may be unfavorable to affected party.** When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision, and the new decision may be unfavorable to the affected party, the officer shall give the affected party 30 days after service of the motion to submit a brief. The officer may extend the time period for good cause shown if the affected party does not wish to submit a brief, the affected party may waive the 30-day period.

(iii) **Proceeding before Board or immigration judge.** When a Service officer is the moving party in a proceeding before the Board or an immigration judge, a copy of the motion must be served on the affected party. The motion and proof of service must be filed with the official having jurisdiction. The affected party has 10 days from the date of service to submit a brief. This time period may be extended as provided in §§ 3.8(c) and 3.22(b) of this chapter.

(6) **Appeal to AAU from Service decision made as a result of a motion.** A field office decision made as a result of a motion may be applied to the AAU only if the original decision was appealable to the AAU.

(7) **Other applicable provisions.** The provisions of § 103.3(a)(2)(x) of this part also apply to decisions on motions. The provisions of § 103.3(b) of this part also apply to requests for oral argument regarding motions considered by the AAU.

(8) **Treating an appeal as a motion.** The official who denied an application or petition may treat the appeal from that decision as a motion for the purpose of granting the motion.

(b) **Motions to reopen or reconsider denials of special agricultural worker and legalization applications.** Upon the filing of an appeal to the Associate Commissioner, Examinations (Administrative Appeals Unit), the Director of a Regional Processing Facility or the consular officer at an Overseas Processing Office may sua sponte reopen any proceeding under his or her jurisdiction opened under Part 210 or 245a of this chapter and may reconsider any decision rendered in such proceeding. The new decision must be served on the appellant within 45 days of receipt of any brief and/or new evidence, or upon expiration of the time allowed for the submission of a brief. The Associate Commissioner, Examinations, or the Chief of the Administrative Appeals Unit may sua sponte reopen any proceeding conducted by that Unit under Part 210 or 245a of this chapter and reconsider any decision rendered in such proceeding. Motions to reopen a proceeding or reconsider a decision under Part 210 or 245a of this chapter shall not be considered.

(c) **Motions to reopen or reconsider decisions on replenishment agricultural worker petitions.** (1) The director of a regional processing facility may sua sponte reopen any proceeding under Part 210a of this title which is within his or her jurisdiction and may render a new decision. This decision may reverse a prior favorable decision when it is determined that there was fraud during the registration or petition processes and the petitioner was not entitled to the status granted. The petitioner must be given an opportunity to offer evidence in support of the petition and in opposition to the grounds for reopening the petition before a new decision is rendered.

(2) The Associate Commissioner, Examinations or the Chief of the Administrative Appeals Unit may sua sponte reopen any proceeding conducted by that unit under Part 210a of this title and reconsider any decision rendered in such proceeding.

(3) Motions to reopen a proceeding or reconsider a decision under Part 210a of this title shall not be considered.

[27 FR 7562, Aug. 1, 1962, as amended at 30 FR 12772, Oct. 7, 1965; 32 FR 271, Jan. 11, 1967; 52 FR 16193, May 1, 1987; 54 FR 29881, July 17, 1989; 55 FR 20770, 20775, May 21, 1990; 55 FR 25931, June 25, 1990; 56 FR 41783, Aug. 23, 1991; 59 FR 1455, Jan. 11, 1994]

§ 103.5a Service of notification, decisions, and other papers by the Service.

This section states authorized means of service by the Service on parties and on attorneys and other interested persons of notices, decisions, and other papers (except warrants and subpoenas) in administrative proceedings before Service officers as provided in this chapter.

(a) **Definitions—(1) Routine service.** Routine service consists of mailing a copy by ordinary mail addressed to a person at his last known address.

(2) **Personal service.** Personal service, which shall be performed by a Government employee, consists of any of the following, without priority or preference:

(i) Delivery of a copy personally;

(ii) Delivery of a copy at a person's dwelling house or usual place of abode by leaving it with some person of suitable age and discretion;

(iii) Delivery of a copy at the office of an attorney or other person, including a corporation, by leaving it with a person in charge;

(iv) Mailing a copy by certified or registered mail, return receipt requested, addressed to a person at his last known address.

(b) **Effect of service by mail.** Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. Service by mail is complete upon mailing.

PART 270—PENALTIES FOR DOCUMENT FRAUD

Sec.
270.1 Definitions.
270.2 Enforcement procedures.
270.3 Penalties.

Authority: 8 U.S.C. 1101, 1103, and 1324c.

§ 270.1 Definitions.

For the purpose of this part—

Document means an instrument on which is recorded, by means of letters, figures, or marks, matters which may be used to fulfill any requirement of the Act. The term "document" includes, but is not limited to, an application required to be filed under the Act and any other accompanying document or material;

Entity means any legal entity, including, but not limited to, a corporation, partnership, joint venture, governmental body, agency, proprietorship, or association, including an agent or anyone acting directly or indirectly in the interest thereof.

[57 FR 33866, July 31, 1992]

§ 270.2 Enforcement procedures.

(a) Procedures for the filing of complaints. Any person or entity having knowledge of a violation or potential violation of section 274C of the Act may submit a signed, written complaint to the Service office having jurisdiction over the business or residence of the potential violator or the location where the violation occurred. The signed, written complaint must contain sufficient information to identify both the complainant and the alleged violator, including their names and addresses. The complaint should also contain detailed factual allegations relating to the potential violation including the date, time and place of the alleged violation and the specific act or conduct alleged to constitute a violation of the Act. Written complaints may be delivered either by mail to the appropriate Service office or by personally appearing before any immigration officer at a Service office.

(b) Investigation. When the Service receives complaints from a third party in accordance with paragraph (a) of this section, it shall investigate only those complaints which, on their face, have a substantial probability of validity. The Service may also conduct investigations for violations on its own initiative, and without having received a written complaint. If it is determined after investigation that the person or entity has violated section 274C of the Act, the Service may issue and serve upon the alleged violator a Notice of Intent to Fine.

(c) Issuance of a subpoena. Service officers shall have reasonable access to examine any relevant evidence of any person or entity being investigated. The Service may issue subpoenas pursuant to its authority under sections 235(a) and 287 of the Act, in accordance with the procedures set forth in § 287.4 of this chapter.

(d) Notice of Intent to Fine. The proceeding to assess administrative penalties under section 274C of the Act is commenced when the Service issues a Notice of Intent to Fine. Service of this notice shall be accomplished by personal service pursuant to § 103.5a(a)(2) of this chapter. Service is effective upon receipt, as evidenced by the certificate of service or the certified mail return receipt. The person or entity identified in the Notice of Intent to Fine shall be known as the respondent. The Notice of Intent to Fine may be issued by an officer defined in § 242.1 of this chapter or by an INS port director designated by his or her district director.

(e) Contents of the Notice of Intent to Fine.

(1) The Notice of Intent to Fine shall contain the basis for the charge(s) against the respondent, the statutory provisions alleged to have been violated, and the monetary amount of the penalty the Service intends to impose.

(2) The Notice of Intent to Fine shall provide the following advisals to the respondent:

(i) That the person or entity has the right to representation by counsel of his or her own choice at no expense to the government;

(ii) That any statement given may be used against the person or entity;

(iii) That the person or entity has the right to request a hearing before an administrative law judge pursuant to 5 U.S.C. 554–557, and that such request must be filed with INS within 60 days from the service of the Notice of Intent to Fine; and

(iv) That if a written request for a hearing is not timely filed, the Service will issue a final order from which there is no appeal.

(f) Request for hearing before an administrative law judge. If a respondent contests the issuance of a Notice of Intent to Fine, the respondent must file with the INS, within 60 days of the Notice of Intent to Fine, a written request for a hearing before an administrative law judge. Any written request for a hearing submitted in a foreign language must be accompanied by an English language translation. A request for hearing is deemed filed when it is either received by the Service office designated in the Notice of Intent to Fine, or addressed to such office, stamped with the proper postage, and postmarked within the 60–day period. In computing the 60–day period prescribed by this section, the day of service of the Notice of Intent to Fine shall not be included. In the request for a hearing. the respondent may, but is not required to, respond to each allegation listed in the Notice of Intent to Fine. A respondent may waive the 60-day period in which to request a hearing before an administrative law judge and ask that the INS issue a final order from which there is no appeal. Prior to execution of the waiver, a respondent who is not a United States citizen will be advised that a waiver of a section 274C hearing will result in the issuance of a final order and that the respondent will be excludable and/or deportable from the United States pursuant to the Act.

(g) Failure to file a request for hearing. If the respondent does not file a written request for a hearing within 60 days of service of the Notice of Intent to Fine, the INS shall issue a final order from which there shall be no appeal.

(h) Issuance of the final order. A final order may be issued by an officer defined in § 242.1 of this chapter, by an INS port director designated by his or her district director, or by the Director of the INS National Fines Office.

(i) Service of the final order.

(1) Generally. Service of the final order shall be accomplished by personal service pursuant to § 103.5a(a)(2) of this chapter. Service is effective upon receipt, as evidenced by the certificate of service or the certified mail return receipt.

(2) Alternative provisions for service in a foreign country. When service is to be effected upon a party in a foreign country, it is sufficient if service of the final order is made: (i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(ii) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or

(iii) when applicable, pursuant to § 103.5a(a)(2) of this chapter.

Service is effective upon receipt of the final order. Proof of service may be made as prescribed by the law of the foreign country, or, when service is pursuant to § 103.5a(a)(2) of this chapter, as evidence by the certificate of service or the certified mail return receipt.

(j) Declination to file charges for document fraud committed by refugees at the time of entry. The Service shall not issue a Notice of Intent to Fine for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution or from which there is a significant danger that the alien would be returned to a country in which the alien would have a well-founded fear of persecution, provided that the alien has presented himself or herself without delay to an INS officer and shown good cause for his or her illegal entry or presence. Other acts of document fraud committed by such an alien may result in the issuance of a Notice of Intent to Fine and the imposition of civil money penalties.

[57 FR 33866, July 31, 1992]

§ 270.3 Penalties.

(a) Criminal penalties. Nothing in section 274C of the Act shall be construed to diminish or qualify any of the penalties available for activities prohibited by this section but proscribed as well in title 18, United States Code.

(b) Civil penalties. A person or entity may face civil penalties for a violation of section 274C of the Act. Civil penalties may be imposed by the Service or by an administrative law judge for violations under section 274C of the Act. The Service may charge multiple violations of section 274C of the Act in a single Notice of Intent to Fine, and may impose separate penalties for each such unlawful act in a single proceeding or determination. However, in determining whether an offense is a first offense or a subsequent offense, a finding of more than one violation in the course of a single proceeding or determination will be counted as a single offense.

(1) A respondent found by the Service or an administrative law judge to have violated section 274C of the Act shall be subject to an order:

(i) To cease and desist form such behavior; and

(ii) To pay a civil penalty according to the following schedule:

(A) First offense. Not less than $250 and not more than $2,000 for each fraudulent document or each proscribed activity described in section 274C(a)(1)–(a)(4) of the Act, or

(B) Subsequent offenses. Not less than $2,000 and not more than $5,000 for each fraudulent document or each proscribed activity described in section 274(C)(a)(1)–(a)(4) of the Act.

(2) Where an order is issued to a respondent composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for a fee for employment (without reference to the practices of, and not under the common control of or common control with, another subdivision), each subdivision shall be considered a separate person or entity.

[57 FR 33867, July 31, 1992]

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 1997 one copy of Brief for Appellants was served as indicated below, upon:

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