

was sorely neglected in the guide. In separate letters to CIS after the conference, CLINIC and other advocates urged the agency to re-write the guide entirely, extend the time frame for its development, and include on the panel adult educators who work directly with naturalization applicants preparing for the test.

CIS plans to implement Phase I(b) of the pilot this summer. This phase will involve supplemental studies of alternative test formats, computer-based testing, targeted intervention with low-performing applicants, and required preparation time. Phase II will be implemented from fall 2004 to spring 2005 and will include the entire citizenship test: English, history, and civics. In 2005, CIS will evaluate the Phase II findings, make final revisions to the test, and publish proposed regulations in the Federal Register to support the new testing process. The target date for nationwide implementation of the revised citizenship test is 2006. These dates are subject to change and will likely be extended based on CIS's past performance in meeting deadlines for this project. For further information about the test revisions, please contact Laura Burdick at lburdick@cliniclegal.org.

VIEW FROM THE FIELD

**Diocesan Detention Program Highlight:
Catholic Charities of the Archdiocese of Baltimore**

Catholic Charities of Baltimore's Immigration Legal Services (ILS) program has provided services to over 1,800 immigrants and refugees and their family members. The services they provide include assistance with applications for U.S. citizenship, asylum, family-based and employment-based immigrant and nonimmigrant visa petitions, changes of nonimmigrant status, applications for work authorization, as well as representation of persons in deportation proceedings.

In addition, since January 2002, ILS has operated an immigration detention project that has evolved from providing legal advice to immigration detainees only through written correspondence to a program that, in many cases, offers legal advice through in-person visits to detainees and direct representation in meritorious cases.

In Maryland, the majority of detainees with active cases in Baltimore's Immigration Court are housed at one of three county facilities on Maryland's remote Eastern Shore, all of which are located more than a two-hour drive from Baltimore. Immigrants who have already been ordered deported ("removed") but who are still waiting for the government to physically remove them from the United States, are often housed at a jail in rural St. Mary's County, a two-and-a-half-hour drive from Baltimore. This geographical isolation has made it almost impossible for indigent detainees to find low-fee or pro bono legal services.

Aware that detainees, some with strong claims for relief, were being detained and deported without legal assistance, Mark Horak, SJ, founding attorney of ILS, hired a part-time paralegal, Bridgett Devaney, to visit the local detention centers and meet with detainees personally. This multi-lingual paralegal now visits each Eastern Shore jail at least once a week. She meets with all detainees who sign up to speak with her and who have written (or whose families have written) to Catholic Charities for help. After interviewing detainees, Ms. Devaney calls the Baltimore-based ILS attorneys to review cases, especially if direct representation appears warranted. The ILS staff in Baltimore and Ms. Devaney, who was granted full accreditation by the BIA in 2003, then share responsibility for providing direct representation.

In mid-2003, ILS began a one-year partnership with the Catholic Charities Immigration Legal Services of Washington, D.C., which the D.C. program undertook with partial funding provided by a CLINIC detention stipend. Under the partnership, the D.C. program provides direct legal representation to a small caseload of detainees initially screened by ILS. The hope is that, by working together, the two programs can eliminate duplicative case evaluations and maximize resources for direct representation.

In the last year, ILS staff has represented detainees in custody reviews, bond hearings and removal merits cases in the Baltimore immigration court, motions to reopen, and several BIA appeals. In addition, approximately 150 detainees were provided with legal consultations (most via in-person meetings) to assess their immigration issues. ILS staff believes that discussing the details of detainees' cases provides them with some solace – even when they do not have immigration relief – since it demonstrates that someone outside the detention facility cares enough about them to visit.

LAW AND PRACTICE FEATURE

Lessons from Legalization

By Charles Wheeler

Given the number of bills currently pending in Congress that would provide some form of legalization to undocumented aliens, and the momentum that has been building to pass a major immigration reform law, we thought it would be helpful to give some historical perspective from the last major amnesty law. In 1986 Congress passed the Immigration Reform and Control Act (IRCA) that allowed for the legalization of persons who had been unlawfully present since before January 1, 1982 (general amnesty) and for special agricultural workers who had worked 90 days in agriculture during a certain period in 1985-86 (SAW program). Approximately three million persons obtained permanent residency under both

programs. The following are some of the lessons we collectively learned during the build up to legislative passage, in preparation for implementation, and during the application process.

During the Legislative Process

IRCA was at least ten years in the making and the result of many competing forces finally reaching a compromise. In conflict were growers' desire for a cheap and reliable source of farm labor and farmworkers' need for protection from exploitation. Growers feared that a program that offered undocumented aliens job portability and permanent residence would lead to labor shortages, since workers would gravitate to higher paying, non-agricultural jobs. They argued for an expanded and streamlined guest-worker program where temporary laborers would be allowed to enter and work for a specific employer at a designated wage. Advocates fought against this and held out for amnesty programs that would legalize the work force while allowing for future "replenishment workers" in the event of labor shortages. IRCA also introduced immigration verification requirements, employer sanctions for unlawful employment, and tougher border and other enforcement measures. To counter this increased enforcement, advocates pushed for and obtained two amnesty programs and an updating of the registry date so that undocumented aliens who had been living and working in the United States for a certain number of years could obtain permanent residence.

The law Congress ultimately passed set realistic standards for establishing eligibility. General amnesty applicants needed to prove unlawful residence since before January 1, 1982; SAWs had to establish employment in seasonal agricultural services during the one-year period ending on May 1, 1986. While the INS preferred receiving some form of documentary evidence for each year of claimed residence, general amnesty applicants were allowed to use declarations from friends or employers to cover large periods of time. SAW applicants were allowed to submit a single declaration from a farm labor crewleader to document prior employment. In fact, once the SAW submitted the declaration, the burden shifted to the federal agency to establish its unreliability. Congress recognized that by the nature of their work and their need to migrate, few undocumented farmworkers would have maintained employment records indicating where they had worked, the number of hours, and the type of crops picked, during the relevant period.

Congress also recognized that undocumented workers would be reluctant – at least at first – to file their applications directly with the INS due to fear of possible arrest and deportation. Therefore, they were allowed to file with "qualified designated entities" that would in turn forward the applications to the Service. Creating this buffer helped encourage applicants to file with one of the QDEs and work with that agency's staff in the application process. Unfortunately, Congress failed to establish firm

standards for the designation of QDE status, resulting in "notarios" and other for-profit consultants obtaining designation. Ultimately, a total of 977 QDEs were designated, many of which were not BIA-recognized, attorney-staffed, or even nonprofit. The INS should have limited QDE status to those nonprofit agencies that had evidenced a capacity, in both experience and expertise, to run a successful and high-volume legalization program. It should then have advertised the names of those QDEs and encouraged applicants to contact them.

IRCA limited the implementation stage to six months. This required the federal agency to gear up quickly to implement both employer sanctions, general amnesty, updated registry, SAW legalization, and other IRCA programs. In hindsight, there was simply too much for INS to do in the six-month period between IRCA's passage and the start of the application period: launch campaigns publicizing the terms of the amnesty programs; draft preliminary, interim, and final regulations; develop a system for multi-level adjudication; hire adjudicators; develop working relations with local community-based organizations, most of which they had previously considered adversaries; and try to mitigate the "fear factor" that would make eligible aliens wary of applying. But the time pressure did force the agency to act, and it ultimately met the statutory deadline. It decided on a "hierarchical review" approach to adjudication where intake and initial recommendations were made at the district level. Final adjudication was made at the regional level. Appellate review took place at the national level. It established new legalization offices (LO), regional processing facilities (RPF), and a legalization appeals unit (LAU). This general regional/local model remains in effect today for the adjudication of many types of immigration benefits.

To further ensure that eligible persons would not be intimidated from applying, Congress added language guaranteeing the confidentiality of the applicant and protecting against civil enforcement should the application be denied. Basically, the INS was prohibited from initiating deportation proceedings against an unsuccessful applicant unless the agency was also seeking criminal prosecution for fraud, which it rarely did. This proved a very effective tool in persuading persons to come forward and apply, even though certain agency officials later sought ways around this provision.

Congress failed to provide benefits for the ineligible dependents of the amnesty alien. This resulted in certain family members living in fear of detection. When the legalized aliens obtained permanent residence and filed family-based visa applications for their spouses and children, the backlogs in the second preference category swelled. The administration tried to address the problem by allowing for the granting of work authorization and protection from deportation for family members who did not qualify for one of the legalization programs but who had nevertheless been in the United States for a certain period of time. This "family fairness" program ultimately

led to the formal Family Unity program in 1990 when Congress passed subsequent legislation. Congress has now recognized that dependents must be provided some form of protection and has made this a part of later programs, such as NACARA and HRIFA.

After Passage and Before Implementation

Congress mandated that the INS cooperate with QDEs in conducting an outreach and publicity campaign to advertise the general amnesty program requirements and benefits. It later appropriated and allocated funding for this purpose. However, most of the publicity funds were contracted to one national media company, and little of it trickled down to the local community-based organizations. Although local advertising and outreach proved very successful, the costs were mostly borne by the CBOs. Also, most of the advertising about legalization targeted the Hispanic market, leaving the non-Hispanics largely in the dark. The lesson is that more money should have been appropriated for outreach to a wider range of ethnic groups and that at least some of that money should have gone to the local CBOs for their efforts. They played a vital role in broadcasting the message about legalization, and they will be in a similar position in the implementation of any future earned legalization.

Final regulations set amnesty application fees at \$185 (\$50 for a child) with a family cap of \$420. This amount of money proved difficult to raise for many applicants, but the agency did allow for the filing of fee waiver requests. These fees now seem small in comparison to those recently proposed for more routine immigration applications (e.g., \$185 for an I-130; \$320 for an N-400).

A coalition of national nonprofit organizations formed in Washington, DC and worked closely together during the six-month planning stage. They met regularly as a group with INS, provided input during the regulatory comment period, disseminated information to their affiliates throughout the country, received feedback from them, and advocated for a generous interpretation of the statutory provisions. Once the regulations were published, these groups divided up the labor for writing instruction manuals, conducting trainings, providing technical assistance, creating community education materials, and initiating class action challenges. Many of these same groups are still active in the DC area and perform some of the same functions. The process of implementing IRCA strengthened the alliances among each other and to some extent their future relationship with INS officials. Input into IRCA later evolved into advocacy for future reform legislation and administrative actions at the national level, and organizing/civic empowerment at the local level.

At this local level, many faith-based and other organizations sprang up or expanded to address the community's need for competent, low-cost immigration assistance. Many of these organizations continued providing other immigration services long after amnesty was over; some are still active today. As a result of IRCA,

many grassroots organizations providing services to immigrants are now better connected at both the local and national levels.

During the period before applications were accepted, many local service providers hired more staff, rented additional space, and purchased new computers and other equipment. They sent their staff to trainings and purchased legal reference materials. These agencies benefitted from their investments in personnel and infrastructure during the application period and thereafter. But in some cases it caused short-term financial strains when revenue derived from the applicants was lower than expected and the bulk was received toward the end of the application period.

Many local programs launched their own outreach and publicity campaigns using self-generated materials and bilingual staff. They met with local media; provided information and quotable statements; and contributed articles, letters, and editorials. They met regularly with INS district office staff and worked together in advertising the legalization programs. These relationships – with both the media and the INS – continued after legalization ended.

During the Implementation Stage

Agencies developed different models to deal with the legalization, depending on the size of the agency, their prior experience and knowledge of immigration law, the anticipated number of applicants, their financial resources, and their ability to recruit volunteers. Some of the more successful faith-based programs worked with local priests or other religious leaders to encourage participation of both applicants and volunteer staff. These agencies conducted interviews in churches and community centers and relied on the trained volunteers to screen applicants, complete the forms, assemble documents, and photocopy the applications. Final review and quality control was performed by a staff attorney or experienced immigration counselor. Most programs charged applicants \$100 for the service, which covered their costs and encouraged client "buy-in." The challenges included training and supervising the volunteers and extra staff, coordinating all the group sessions and after-hours work, staying abreast of legal interpretations, and meeting client expectations. Every program reported working long hours and experiencing tremendous stress.

The national or regional support organizations, such as Migration and Refugee Services and Immigrant Legal Resource Center, prepared model intake/client interview forms and detailed legal reference materials. They also provided ongoing technical assistance. Much of the written material was geared for inexperienced agency staff and tried to cover all possible legal complications. Local programs used these materials extensively – at least in the beginning – and appreciated the thought and legal expertise that went into their development. The

materials and trainings encouraged local practitioners to screen applicants carefully for a full range of possible problems and to submit as much documentation of residency as reasonably possible. This erring on the side of caution, however, resulted in longer interviews and fatter applications than proved necessary, given the adjudication standards that INS applied. Some agencies soon dropped the sample intake forms and just used the application form itself, and submitted less documentation, which speeded up the process considerably.

QDEs were supposed to receive \$15 from the INS for every legalization application they submitted (\$16 if they were operating under a national umbrella organization). This figure should have been set higher – at least \$25 – given the amount of work involved in assembling each application. However, the INS was also authorized to advance funds to agencies that entered into these “cooperative agreements” based on the number of applications they expected to turn in. The INS didn’t recoup the difference when agencies failed to meet expectations, but it did withhold payment to agencies that submitted more applications than they were compensated for in the up-front moneys. A bigger problem was that many applicants went to the QDEs for initial consultation and advice – even help in assembling documents and filling out the application – and then filed directly with the INS. Some went to notarios who promised speedier results. Many of the QDEs were not fully reimbursed for their efforts. Only about 18 percent of the applications filed with the INS were submitted by QDEs, a figure that does not reflect all the work they did through outreach, community education, “charlas,” group sessions, and one-on-one initial client interviews. Some QDEs should have taken better steps to retain clients, file more applications, and obtain higher reimbursement.

The general amnesty program was designed to pay for itself in application fees, which it ultimately did. However, receipts flowed into the INS more slowly than anticipated, and then surged during the last month. Rather than request a specific Congressional appropriation to implement the program, the agency borrowed from other INS programs. The federal agency went through the same growth spurt and spending spree as some local CBOs. But anticipated revenue was off by 25 percent by the end of the first fiscal year, resulting in belt-tightening and staff reductions. During the last couple months of the application period, when filings were at their highest, the INS was understaffed. This proved unfortunate, since the agency needed to encourage people to file and facilitate their filing in order to increase revenues. Ultimately, the agency collected \$189 million in application receipts from the general amnesty program and \$137 million from the SAW program, which surpassed their expectations. But to encourage earlier filing and generate more timely revenue, the INS should have allowed the filing of skeletal applications and the later submission of supporting documentation.

With some important exceptions – such as its interpretation of “known to the government” and “brief, casual, and innocent departures” – the INS adjudicated applications for the general amnesty program in a generous fashion. The adjudicatory system, where there was intake and interview at the local level and adjudication at the higher level, worked well. Out of the 1.75 million applications for temporary residence, the agency granted 1.65 million, resulting in an overall approval rate of 94 percent. But far fewer people applied for general amnesty than the four million the agency had anticipated, and a disproportionate percentage of Hispanics applied than other ethnic groups. The agency failed to set forth clear standards for the adjudication of applications that were based largely or exclusively on affidavits. And the agency was also overly narrow in its interpretation of some of the statutory provisions, resulting in confusion, reluctance on the part of potential applicants, and protracted litigation, most of which ultimately succeeded in broadening eligibility. Two of the major class action law suits filed in 1987 were just recently settled.

In contrast, the agency quickly suspected widespread fraud in the SAW program, and this belief pervaded the adjudication process. The RPFs took procedural shortcuts and applied the wrong standard in adjudicating SAW applications, resulting in court-mandated re-adjudications and delay. Some local LOs mounted their own anti-fraud efforts and turned interviews into interrogations.

Far more aliens applied for SAW legalization (1.3 million) than were projected (250,000). The final approval rate did not reflect the long delays that many applicants experienced. Four years after the application period began, the agency had yet to adjudicate a quarter of the applications. Nor did it reflect the wholesale denial of applications containing declarations from certain crewleaders believed to have committed fraud. For example, some crewleaders signed both legitimate and fraudulent declarations. SAW applicants who had worked the required number of days in seasonal agricultural employment were treated the same as those who didn’t if the same crewleader signed their declarations. The agency believed the standard of proof and documentary evidence – one crewleader declaration – was too low and difficult for the agency to refute. This resentment can now be seen in pending farmworker legalization where Congress is raising the bar for applicants and requiring more specificity and proof of past agricultural labor.

Conclusion

It would be hard to overstate the impact IRCA has had on immigrant advocacy at both the local and national levels. To some extent it was the catalyst for the expansion and enhancement of immigration service providers and the creation of networks that now bind them. This loose federation of faith- and community-based organizations is

in a much better position to respond should any new legalization bill become enacted.

In contrast, while most people conclude that the INS reacted reasonably well to IRCA's demands, given that it ultimately legalized three million applicants, few believe the government is capable of implementing any similar legalization program today. The INS has been split into at least three distinct parts and there is little evidence yet of effective coordination. Morale seems low, job security vague, and the needed funding is flowing into stepped-up enforcement. Backlogs mount up and delays become norm. Clearly, the agency is incapable of doing its current job, much less taking on a massive new program. But the current director seems well-intentioned and is taking steps to improve the situation. Perhaps he can turn the agency around by the time Congress passes any meaningful reform legislation.

IMMIGRATION LAW UPDATES

DHS Proposes Higher Application Fees. The Department of Homeland Security has proposed an average \$55 fee increase for most immigration benefits applications. The fee for fingerprints will increase by \$20. The U.S. Citizenship and Immigration Services justifies the fee increase on rising costs, the introduction of more security checks, a growing backlog, and the need to have fees fully pay for the costs of application adjudication. Section 286(m) of the Immigration and Nationality Act allows for the collection of fees that will fully reimburse the agency for application adjudication and naturalization services, as well as for processing asylum claims, which are filed without a fee.

The agency last raised fees in 2001. Congress mandates that every two years the agency review whether the fees it charges cover the costs. "We have been losing a great deal of money, nearly \$1 million a day since Oct. 1, the start of this fiscal year, and that's directly attributed to the cost of doing business and background checks, the comprehensive background checks that we conduct on every single application," said Russ Knocke, CIS spokesman.

BIA Reform Changes Immigration Appeals Landscape By Molly McKenna

In late August 2002, the Department of Justice issued final regulations that drastically changed the structure and procedure for reviewing case appeals brought before the Board of Immigration Appeals (BIA). Many of the changes, including abbreviated time limits for processing appeals, a reduction of the BIA from 23 to 11 members, and the expanded use of affirmance without opinion decisions by single Board members, emphasize expediency over fairness. A recent study commissioned by the American Bar Association found that the BIA has sharply reduced the number of appeals it grants: from one

in four in 2001 to one in 10 today. Another consequence of the BIA restructuring regulations involves a 379 percent increase (over a 12-month period) in the number of immigration cases filed in the federal courts.

For the past three years, CLINIC has coordinated the BIA's Pro Bono Project, which matches volunteer attorneys with unrepresented, indigent immigrants who have cases on appeal before the BIA. CLINIC's experience with BIA decisions since the implementation of the new BIA regulations is consistent with the findings of the ABA study. It has also seen an increase in the number of its BIA Project volunteers who resort to filing appeals in federal court to receive complete and thorough review. CLINIC also believes that the new BIA regulations are especially detrimental to pro se individuals. This article briefly highlights some of the changes implemented by the new regulation and the consequences of this reform. It also describes helpful resources available to BIA practitioners.

Background: BIA Restructuring Regulation

At a press conference on February 6, 2002, the Attorney General stated that the BIA reform was part of a series of reorganizations within DOJ to "serve better our mission of protecting America from terrorist attack[s], our mission of enforcing our nation's laws and safeguarding our civil liberties," as well as to eliminate the BIA's backlog of 56,000 pending cases.

Within six months of the regulation's implementation, the BIA was instructed to adjudicate the backlog of approximately 55,000 cases while continuing to adjudicate new cases. At the same time, the number of judges, or Board members who issue decisions on cases brought before the BIA, was reduced from 23 to 11 members. According to one estimate, meeting this goal would require each of the remaining eleven Board members to decide an average of 50 cases per week. In addition, the new regulation imposes strict deadlines by which Board members must complete cases. It also directs the Chairman of the Board to notify the Director of the Executive Office for Immigration Review (EOIR) and the Attorney General if a Board member consistently fails to meet those deadlines.

Additional Hardship to Pro Se Individuals

The new regulations also shortened the briefing period for appeals before the BIA from 30 to 21 days, and in detained cases, changed the briefing schedule from a consecutive to a simultaneous schedule. As a result, immigrants who receive a favorable grant of relief from removal by an IJ, which is subsequently appealed by the government, do not have the opportunity to review the government's arguments against them prior to making arguments in their own defense. This development is particularly harmful to unrepresented immigrants. With little understanding of the complex case law that governs immigration appeals cases, these individuals are in