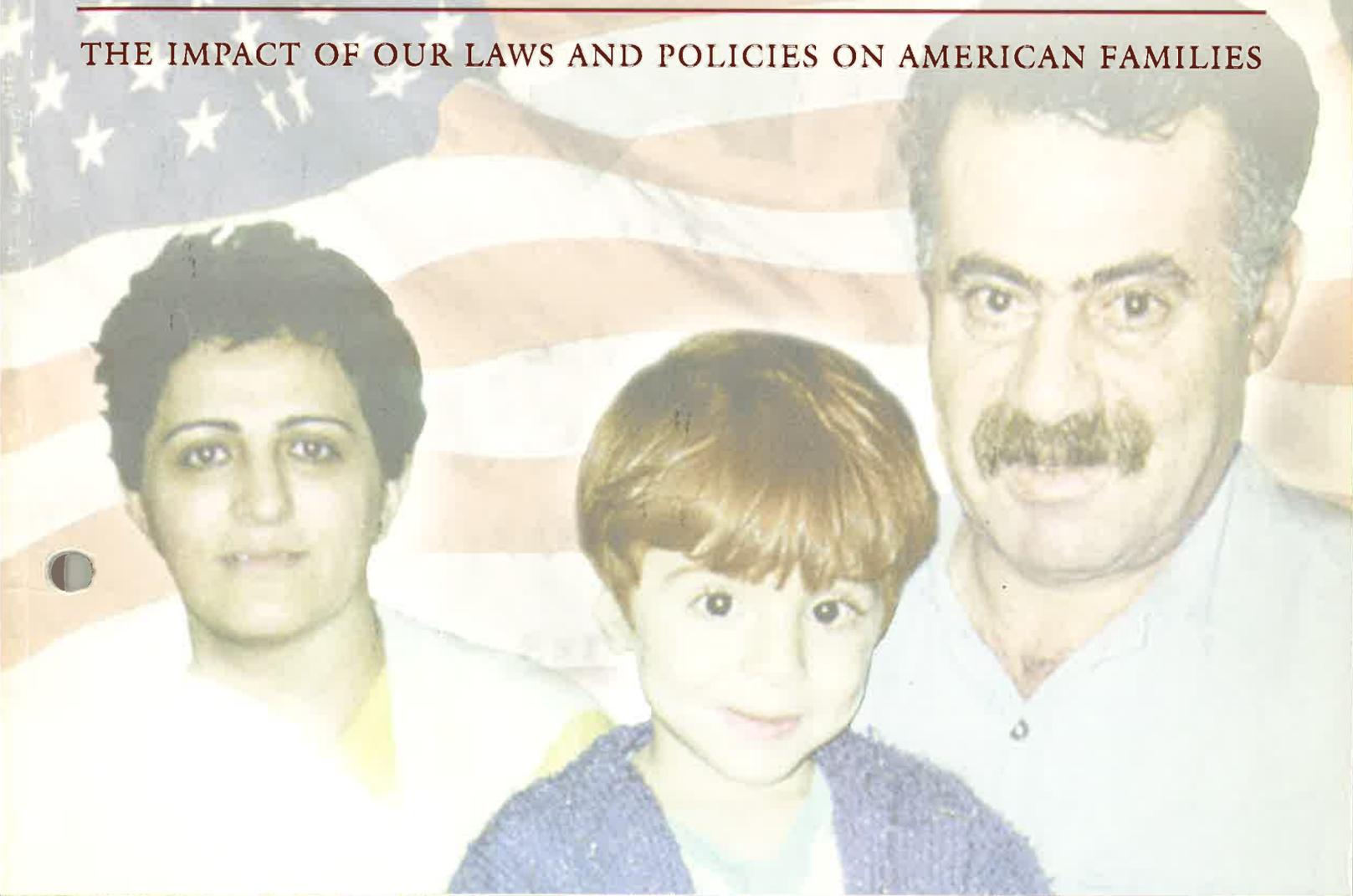


# PLACING IMMIGRANTS AT RISK:

THE IMPACT OF OUR LAWS AND POLICIES ON AMERICAN FAMILIES



## Credits

This report on immigrant families is the first in a series by the Catholic Legal Immigration Network, Inc. (CLINIC), titled “Placing Immigrants At Risk.” The series will attempt to put a human face on the harsher aspects of our nation’s immigration laws and policies by sharing the stories of newcomers who are experiencing hardship in the United States. The series intends to be descriptive, not a vehicle to advance specific policies or reforms. It trusts that the stories it recounts will speak powerfully for themselves.

Since its inception in April 1999, this project has been a collaborative one. CLINIC paralegal Molly McKenna has masterfully staffed the project, and is responsible for most of the case studies and research in the immigrant family report. Juan Osuna, the report’s editor, has effectively guided and shaped the project from the outset. Donald Kerwin, CLINIC’s Chief Operating Officer, served as the report’s lead writer; he pulled the report’s sections into a cohesive whole, wrote its introduction, and contributed language to several sections. CLINIC Senior Attorney Charles Wheeler carefully reviewed, edited, and supplemented the report.



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IMMIGRATION  
NETWORK, INC.

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# LETTER OF INTRODUCTION FROM MOST REVEREND THOMAS G. WENSKI

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It gives me great pride to introduce this series of reports by the Catholic Legal Immigration Network, Inc. (CLINIC) on "at-risk" immigrants in the United States. The first report will detail the devastating impact of our immigration laws and policies on U.S. families.

Subsequent reports will cover immigrant laborers, those in the custody of the Immigration and Naturalization Service (INS), immigrants seeking to become U.S. citizens, and other groups of at-risk newcomers.

CLINIC, a subsidiary of the U.S. Catholic Conference, is a legal support agency for 131 local Catholic immigration programs nationwide. Beyond its legal support work, CLINIC provides direct legal services and administers programs for underserved immigrant populations, like INS detainees, victims of domestic violence, and certain groups of lawful permanent residents seeking citizenship. In this series of reports, CLINIC hopes to give witness to the struggles and challenges faced by newcomers as they try to make the United States their home. If successful, the reports will serve as a bridge between marginalized newcomers and those who shape our nation's immigration policies.

Immigrant families occupy a place of reverence in our nation's history. One might argue that the United States has been built by successive waves of immigrant families, the older generations constantly struggling to make a better life and nation for their progeny. Yet, despite the generosity of many aspects of our immigration system, certain laws and policies do not honor this heritage.

Migration, of course, also plays a sacred role in the Catholic Church. From the Exile and Exodus of Ancient Israel, to the Holy Family's Flight into Egypt, to the work of Christian missionaries beginning with St. Paul, we have been a people on the move, a pilgrim people. In the Catholic tradition, advocacy for newcomers and other marginalized people takes its legitimacy from service. This goes to advocacy's very purpose — to give voice to the poor. After all, one cannot give voice to others without knowing them. Consistent with this goal, this series of reports will attempt to tell the stories of individuals kept on the margins of our society by our nation's laws and policies.

We hope that in reading these reports you will see, as we do each day, the disruption and devastation worked on "at risk" immigrants in this country. In offering the reports, it is our sincere hope that they will lead to changes in our immigration system so that it might better reflect the God-given dignity of newcomers and the crucial role they continue to play in our nation's development.

Most Reverend Thomas G. Wenski  
Chairman of CLINIC's Board of Directors  
Auxiliary Bishop of Miami

# ACKNOWLEDGMENTS

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This report on immigrant families is the first in a series by the Catholic Legal Immigration Network, Inc. (CLINIC), entitled "Placing Immigrants At-Risk." The series will attempt to put a human face on the harsher aspects of our nation's immigration laws and policies by sharing the stories of newcomers who are experiencing hardship in the United States. The series intends to be descriptive, not a vehicle to advance specific policies or reforms. It trusts that the stories it recounts will speak powerfully for themselves.

CLINIC, a subsidiary of the U.S. Catholic Conference, provides legal support services to a network of 131 local Catholic immigration programs. From its ten offices nationwide, CLINIC also directly represents and administers legal service projects for at-risk newcomers.

Since its inception in April 1999, this project has been a collaborative one. CLINIC paralegal Molly McKenna has masterfully staffed the project, and is responsible for most of the case studies and research in the immigrant family report. Juan Osuna, the report's editor, has effectively guided and shaped the project from the outset. Donald Kerwin, CLINIC's Chief Operating Officer, served as the report's lead writer; he pulled the report's sections into a cohesive whole, wrote its introduction, and contributed language to several sections. CLINIC Senior Attorney Charles Wheeler carefully reviewed, edited, and supplemented the report. CLINIC attorneys and paralegals wrote the following sections:

Section A: Family-Based Immigration: Backlogs, Processing Delays, and Poor Service (Peggy Gleason)

Section B: Family Reunification but Not for the Poor (Charles Wheeler)

Section C: American Families with Undocumented and Other Members Who Are Subject to Bars on Admission (Peggy Gleason, Charles Wheeler)

Section D: Reinstatement of Removal (Mario Russell)

Section E: Victims of Domestic Violence (Anne Marie Gibbons)

Section F: Immigrant Families With Members Who Have Criminal Convictions (Helen Morris)

Section G: How Detention Divides Families (Donald Kerwin)

Section H: The Impact of Workplace Raids on Families (Pat Malone)

Section I: Deaths on the Southern Border (Molly McKenna)

Section J: Preying Upon Immigrants: The Human Toll of Unauthorized Legal Practice (Karen Herrling)

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CLINIC greatly appreciates the many contributions it received to this report. It hopes that the final product does justice to the newcomers whose stories it tells.

# THE IMPACT OF OUR IMMIGRATION LAWS AND POLICIES ON U.S. FAMILIES

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Photo Courtesy: Jeff Chenoweth

As a nation, we celebrate the values embodied by strong families. We also take great pride in our identity as a nation of immigrants and a haven for the tired, poor and huddled masses from other countries. We recognize, in turn, the crucial role immigrant families have played in our national experience. Beyond their own sacrifices, generations of immigrants have instilled in their children a sense of pride and possibility that has been the indispensable ingredient to their success in the United States. We credit these anonymous immigrant families with creating a nation that symbolizes hope in a world riven with hatred and conflict. The United States proves that a multi-cultural society, devoted to democratic ideals, need not succumb to the strife of Rwanda or the Balkans.<sup>1</sup>

Like their predecessors, today's immigrants depend on their families to help them build productive lives in the United States and to ensure a better future for their children.<sup>2</sup> Our nation's well-being is inextricably bound to the health of its millions of immigrant families. Yet, our immigration laws and policies, particularly since passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("the 1996 Immigration Act")<sup>3</sup>, too often divide, impoverish, and

keep immigrant families unsettled. While this report will focus on individual cases, the scope of the problem can be suggested by some statistics.

- The foreign-born and their children comprise one out of every five residents of the United States. This translates into more than 27 million foreign-born persons and roughly an equal number of their children.<sup>4</sup>
- More than 3.5 million family members of U.S. citizens and legal permanent residents who have been approved for family-based immigrant visas, languish in backlogs, either separated from their family members or in a legal limbo in the United States.<sup>5</sup> Section A of this report describes how processing delays, backlogs, and poor service undermine immigrant families and impede their reunification.
- An estimated 41 percent of U.S. households with foreign-born heads survive on income of less than 125 percent of the federal government's poverty line -- the amount established as the threshold for U.S. citizens and permanent residents who want to sponsor family members to join them in the United

States.<sup>6</sup> Section B details the impact of the new sponsorship provisions on working class families.

- Roughly six million undocumented persons live in the United States,<sup>7</sup> many in “mixed status” families, defined as those with at least one noncitizen parent and one U.S. citizen child. Nine percent of families with U.S. citizen children have at least one noncitizen parent.<sup>8</sup> Ten percent of all children in the United States live in mixed status families.<sup>9</sup> In immigrant families, 75 percent of the children are U.S. citizens.<sup>10</sup> Section C describes how bars to admission to the United States, particularly those for “unlawful presence,” compromise immigrant families and hurt their children.
- In 1999, the Immigration and Naturalization Service (INS) removed 176,990 persons from the United States, and immigration judges ordered an additional 72,000 to depart “voluntarily.”<sup>11</sup> Many immigrants, after having been deported, return to the United States and establish families. Section D discusses the automatic removal and permanent bars to re-entry faced by previously deported immigrants with U.S. citizen and lawful permanent resident spouses and children.
- Of the estimated two to four million women who suffer domestic violence annually in the United States, undocumented immigrants face the greatest difficulty in obtaining legal protection and assistance.<sup>12</sup> Section E describes how the gaps in our law’s protections for victims of domestic violence threaten them and their children.
- In 1999, the INS removed 62,359 immigrants with criminal convictions from the United States.<sup>13</sup> Under current law, long-term lawful permanent residents who committed relatively minor crimes years before face removal. Section F highlights the removal of permanent residents, away from their families, due to their past criminal convictions.
- In 1998, the INS detained 153,517 persons.<sup>14</sup> Due to the “mandatory” detention provisions in the 1996 Immigration Act, this figure could double in the future. In addition, as many as 5,000 immigrants on any given night languish in “indefinite” INS custody because their countries of birth will not accept their return and the INS will not release them.<sup>15</sup> Section G discusses how the mandatory and indefinite detention of immigrants undermine their families.
- In 1998, the INS arrested approximately 14,000 persons in raids at work sites and other locations.<sup>16</sup> Section H describes the impact of raids on immigrant families.
- Roughly 1,600 persons perished between 1993 and 1997 while trying to cross the U.S.- Mexican border into the United States.<sup>17</sup> Family reunification and employment opportunities typically drive illegal border crossings, and U.S. border control policy forces crossers to take remote and treacherous paths. Section I recounts the devastation experienced by the families of those who have died trying to cross the border.
- Thousands of immigrants fall prey each year to incompetent and corrupt “notarios” and “visa consultants.” One unauthorized legal practitioner, who was recently prosecuted, “represented” 1,200 persons. Section J discusses how unlawful practitioners compromise the ability of immigrants to obtain legal status in the United States, leaving immigrant families permanently unsettled.

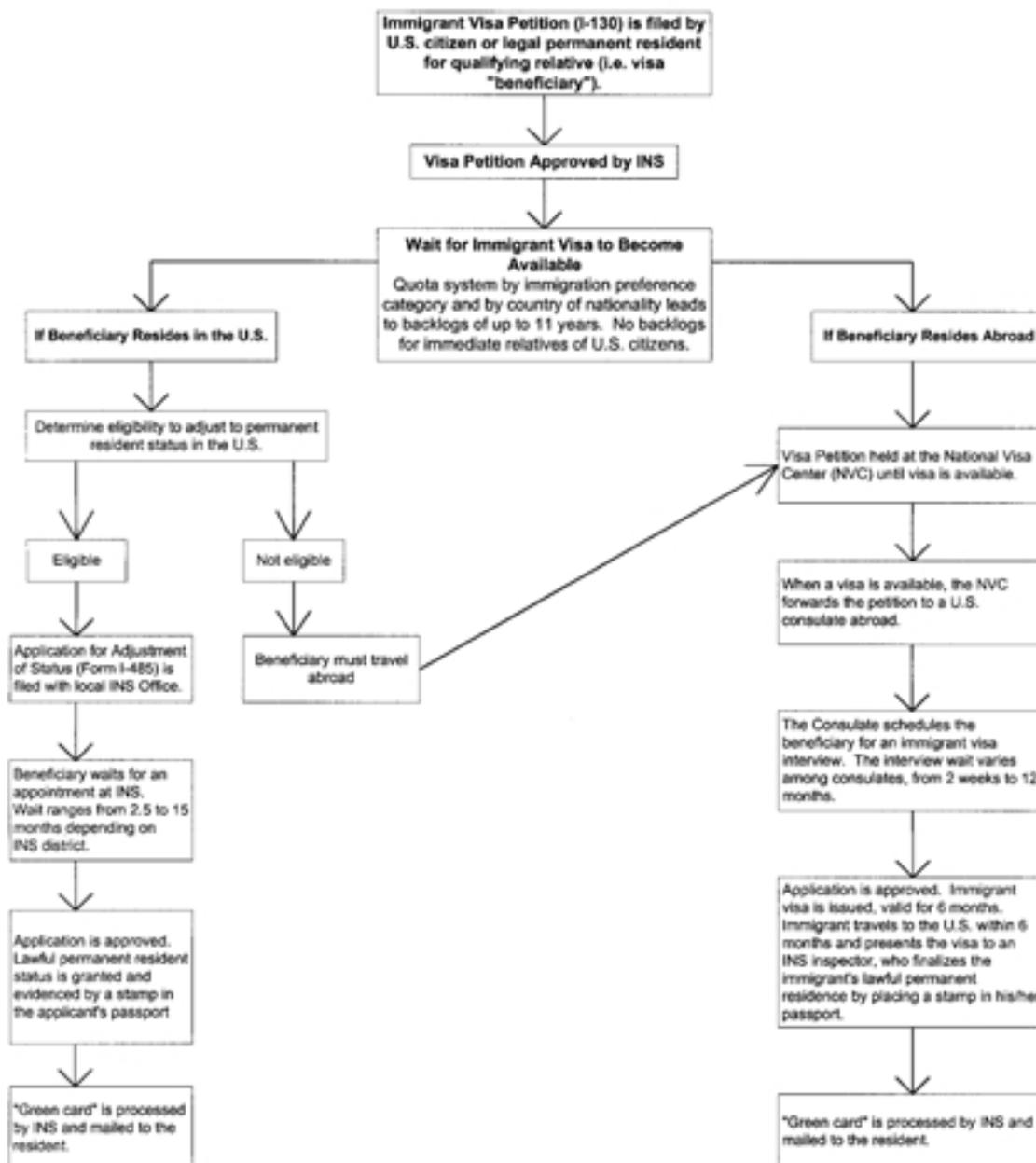
This report is the first in an ongoing series by the Catholic Legal Immigration Network, Inc. (CLINIC) on at-risk immigrants in the United States. The series will attempt to put a human face on the immigrant families devastated by these laws and policies. News reports have documented the anti-family implications of particular laws, but none have examined their cumulative impact on our newest families. The story is a difficult one to tell, given the law’s complexity, the way its provisions inter-relate, the anonymity of its victims, and (paradoxically) the sheer magnitude of the problem. Immigrant families commonly view our immigration laws and policies as a “seamless web” that they cannot escape. This report attempts to tell their story.

# A. Family-Based Immigration: Backlogs, Processing Delays, and Poor Service

The process to obtain a family-based immigrant visa is complicated. Processing delays, backlogs, and poor service on the part of government officials make it worse. While backlogs result from the law itself,

delays and poor service do not. Yet all three demonstrate the gap, so characteristic of the immigration field, between the law's promise and actual practice. All three burden U.S. citizens, legal permanent residents ("green card holders"), and the family members who qualify for family-based immigrant visas. They keep families separated for years, interfere with the educational advancement of their children, and prevent would-be wage-earners from supporting their families.

## Family Based Immigration to the United States



## 1. An Overview of Family Reunification Through the Immigration Preference System

The reunification of families, especially the reunification of spouses and of children with their parents, is a recognized pillar of U.S. immigration law.<sup>18</sup> Our immigration system has traditionally provided a controlled, predictable way for allowing U.S. citizens and lawful permanent residents to petition for close family members to join them in the United States. Through this process, the “beneficiaries” of the petitions become legal permanent residents, allowing them to live and work indefinitely in the United States.

Most immigrants legally admitted to the United States come to join family members.<sup>19</sup> Thus, our immigration system reflects the central importance our nation places on family unity. In the words of INS Commissioner Doris Meissner: “Both U.S. and international law recognize the unique relationship between parent and child, and family reunification has long been a cornerstone of both American immigration law and INS practice.”<sup>20</sup>

Legal immigration to the United States is limited by annual quotas on the number of visas by category of family “preference” (qualifying relationship) and by country of nationality. The only group of family-based immigrants exempt from the numerical limitations are “immediate relatives,” a category that consists of the spouses and minor unmarried children of U.S. citizens, and the parents of U.S. citizens who are at least 21 years old.<sup>21</sup>

Apart from immediate relatives, the system of family reunification encompasses four “preference” categories that are subject to numerical quotas: (1) unmarried, adult children of U.S. citizens; (2) spouses, and unmarried children (regardless of age) of lawful permanent residents; (3) married adult children of U.S. citizens; and (4) brothers and sisters of U.S. citizens.<sup>22</sup> New bars to permanent residence created by the 1996 Immigration Act, combined with backlogs and processing delays, prevent persons who are legally entitled to lawful status under these preference categories from becoming permanent residents.

## 2. Eligible Applicants Must Wait Years to Reunify with U.S. Family Members Due to Backlogs in Preference Categories.

The visa process starts when a U.S. citizen or lawful permanent resident files a petition with INS on behalf of a qualifying family member. The INS typically takes several months to process visa petitions. An approved petition certifies that the applicant has a bona fide and qualifying relationship to the petitioning U.S. citizen or lawful permanent resident. Backlogs exist in most preference categories because the number of persons approved each year for a visa exceeds the total number of visas available. As of January 1997, an estimated 3,535,430 persons, who had been approved for family-based visas, languished in backlogs, including 1,052,270 spouses and minor children of permanent residents.<sup>23</sup> Although more recent figures have not been compiled, the 1997 numbers have certainly increased in the interim.

As a result of backlogs, applicants must wait an additional period after obtaining the INS’s approval on the visa petition before applying for permanent residence. An applicant’s position on the waiting list turns on the date that the petitioner filed the visa petition. When the INS finally reaches the applicant’s filing date, he or she may apply for permanent residence. Some eligible immigrants spend years waiting to be permitted to make such an application. For example, the current waiting period for spouses and minor children of permanent residents from most countries in the world is four and a half years. Adult children of permanent residents endure backlogs of more than seven years. Siblings of U.S. citizens must wait an astounding twelve years.

The backlogs run even longer for persons from countries with large numbers of immigrants, such as Mexico. A Mexican spouse or minor child of a permanent resident must wait almost six years. An adult son or daughter of a permanent resident must wait eight and a half years.<sup>24</sup> Similar waits apply to relatives from the Philippines and India.

These backlogs force many families to remain separated for extended periods, because the visa “beneficiary” must remain in the home country. In other cases, the beneficiary lives in the United States, but the backlogs force him or her to overstay his or her temporary visa and lose legal status. Undocumented persons eligible for family-based visas

remain in a legal limbo, unable to work legally or travel abroad. As discussed later in this report, they also accrue time in “unlawful presence” that will bar them from re-entering the United States when their visa does become available. These families often endure intense emotional and financial hardship.

Children whose applications are subject to the backlogs often face the problem of “aging out” of their preference categories. For example, if a child reaches age 21 while in the preference category for the minor children of permanent residents, he or she then switches to the preference category for adult children, which has a longer backlog. The minor child of a permanent resident from Mexico faces a wait of nearly six years before he or she may apply for permanent residence. If that child turns 21 during this time, he or she must wait another three years, since the child will now be shifted to the even more backlogged category of adult children of permanent residents.<sup>25</sup>

Permanent residents who want to expedite the family reunification process can become U.S. citizens and sponsor their family members as immediate relatives. As stated, there is no backlog (or numerical limitation) for these visas. However, naturalization backlogs now average one year nationally, running from 5 to 19 months depending on the INS district office.<sup>26</sup> Because permanent residents cannot become U.S. citizens in a timely manner, their eligible family members cannot become permanent residents in a timely manner.

### *Backlogs Lead to Possible Deportation of Children Eligible for Family-Based Visas*

After working as farmers in the United States during the 1980s, “Mr. and Mrs. U-” became permanent residents through an agricultural worker “legalization” program. In 1990, shortly after they became residents, their three children joined them in the United States. Today, they live in Virginia and earn their living as farmworkers, frequently traveling to work in Georgia and Maine. Their children, a girl and two boys, who were 10, 11, and 12 years of age when they came to the United States, regard this country as their home. Mr. and Mrs. U- want their children to have a better life than they have had. They have made sure that the family’s work has never interfered with the children’s education. All three children received most of their formal education

in the United States and are fluent in English. They graduated from high school in a rural Virginia community, and distinguished themselves with their academic and athletic achievements. They hope to attend college one day. The oldest son wants to be a policeman.

Mr. and Mrs. U- filed family-based visa petitions for their three children in late 1993. Although the INS approved the petitions, as of March 2000 none of the children had become permanent residents. When they turned 21, the two oldest children were switched into a preference category where the backlog for nationals of Mexico is more than eight years. They will need to wait another three years before they will be eligible to file their applications for permanent residence.

The youngest child is now 20 years old. She has filed her permanent residence application and awaits a decision on the application by the INS.

Mr. U- speaks some English and hopes that he can pass the language and civics test to qualify for U.S. citizenship. Although he filed his application for citizenship in 1998, it has not yet been approved by the INS.

In the meantime, the three children do not enjoy legal status in the United States, cannot pursue their educations or careers, and face possible deportation. The INS does not grant permits to work or travel to people in backlogged preference categories. Since no college will consider them for admission and no employers will hire them, the children’s plans for the future are on hold. Mrs. U- had medical problems in 1999 and had to cut back on her work for several months. The family’s finances are very precarious, since the children are unable to work legally and thus earn a wage that will enable them to support themselves.

Making matters worse, the INS recently arrested the three children after finding them working in a blueberry field. Although INS officials knew that the children had approved visa petitions, they decided to initiate deportation proceedings because the children were in preference categories with multi-year backlogs. The children’s applications for lawful permanent residence will face more obstacles because of the court proceedings, as they can now present their applications for permanent residence only to an immigration judge. The two older children are in a particularly difficult situation. If their priority dates remain backlogged at the time of their

hearing, they will not be eligible to apply for permanent residence. They will also face a bar to any application for permanent residence if they neglect to depart from the United States within the time-frame set by the immigration judge.

### *Son of Lawful Permanent Resident Denied Entry to Receive Medical Treatment*

Many applicants for family-based visas live in their native countries, and remain separated from their permanent resident or U.S. citizen relatives during their wait in the backlogged preference categories. In the meantime, they are not permitted to travel to the United States, even for a family emergency.<sup>27</sup> “Mr. C-” is a permanent resident living in the United States. His only son, age 25, is the beneficiary of an immigrant visa petition that was approved in early 1997. The son (“B-”) is living in Albania while waiting for the seven and one-half-year backlog in his preference category (adult son of a permanent resident) to clear. He will then apply for permanent residence at the U.S. consulate. He has at least four more years to wait.

B- is severely hearing impaired. Recently, his condition deteriorated. He suffers from extreme dizziness, which prevents him from leaving his bed for weeks at a time. He needs immediate medical attention that is not available in Albania. The Military Hospital Center in Tirana, Albania certified the emergency nature of B-'s medical condition and recommended an operation at a specialized clinic abroad. Mr. C- arranged for a private U.S. hospital to perform the operation. B- then applied for a visitor visa to the United States where he hoped to undergo surgery.

The U.S. consulate in Tirana denied B-'s visa application. The consulate averred that as the beneficiary of an approved family-based visa, B- could not establish that he intended to return to Albania. As a result, he was denied both the visitor visa and a temporary permit for humanitarian reasons, called parole. In a sworn statement, Mr. C- offered to post a bond and secure travel documents for his son to guarantee his return to Albania after the surgery, but the consulate has refused to reconsider its decision.



Photo Courtesy: INS

### **3. Processing Delays: Even Immediate Relatives of U.S. Citizens Face Multi-Year Delays for Permanent Residence**

As previously indicated, the only family members who can immigrate without quota restrictions are immediate relatives of U.S. citizens. Though not subject to backlogs, immediate relatives still face significant INS processing delays, as do other family-based visa beneficiaries. The INS acknowledges that processing times have increased in recent years due to changes in the law and the growing number of applications filed. Some of the worst processing delays now occur in the adjudication of applications for permanent residence, which can take as long as three years.<sup>28</sup>

Reports from the INS, the General Accounting Office, and immigration advocates confirm the alarming delays in application processing. The INS announced in August 1999, for example, that the number of pending adjustment of status applications (for permanent residence) had increased from 121,000 in Fiscal Year (FY) 1994 to 811,000 in FY 1998.<sup>29</sup> As of January 2000, this backlog had ballooned to 1,001,550 applications.<sup>30</sup> The length of time an immigrant is forced to wait depends on where he or she lives, since delays vary widely by INS office. For example, as of September 1999, the INS office in Seattle processed permanent resident applications in an average of 90 days, while the Phoenix office averaged 930 days.<sup>31</sup>

In some INS offices, immediate relatives of U.S. citizens must wait more than three years for their applications for permanent residence to be

processed.<sup>32</sup> Processing times can be much longer when a problem occurs in the application, the law changes, or a file is misplaced. According to the INS, waits of 33 months are now typical.<sup>33</sup> In the words of one INS employee: “There’s no polite way to put it - it’s a mess. It’s a ticking time bomb that no one wants to talk about.”<sup>34</sup>

Such lengthy delays are a recent phenomenon. Just four years ago, the typical wait for adjustment to permanent resident status was only six months.<sup>35</sup> As recently as 1998, the average delay was 21 months — a far cry from the current wait of 33 months.<sup>36</sup> The INS is simply unable to keep up with the workload.<sup>37</sup>

The growing processing delays for permanent residence applications can be traced to the intense criticism the INS received for past multi-year backlogs in naturalization cases. In response, the agency shifted staff and resources to handle these cases, at the expense of other applications. This shift happened at a time when the INS faced large increases in permanent resident applications, severe budget shortfalls, and technological problems. At the same time, Congress created new immigration programs for Central Americans and Haitians that had to be handled by existing INS personnel.

The INS funds its immigration adjudication and naturalization service programs through fees paid by applicants.<sup>38</sup> However, the fees collected have failed to cover costs, leaving a \$184 million deficit in 1999.<sup>39</sup> The largest fee is a \$1,000 “penalty” for an application that allows visa beneficiaries to obtain permanent residence without leaving the United States.<sup>40</sup> However, these fees fund INS detention programs. Making matters worse, Congress failed to renew this program in 1997.

From the applicant’s perspective, the increasing delays come at a time when application fees paid to the INS are higher than ever. In August 1998, the agency issued a rule raising application filing fees so substantially that most fees nearly doubled.<sup>41</sup> The fee for filing an application for permanent residence increased from \$130 to \$220, and the fee for naturalization rose from \$95 to \$225. Although fees have gone up, the speed of adjudications has slowed considerably.

INS Commissioner Meissner has acknowledged that the growing delays in permanent residence processing can be attributed in part to the shift in resources to the naturalization program, and to an imbalance between funding for INS “services” and its law enforcement functions.<sup>42</sup>



Photo Courtesy: INS

#### 4. Rudeness, Inefficiency, and Poor Service by the INS

INS personnel on the front lines work under stressful conditions. On a daily basis, lines begin forming outside most INS district offices by dawn and steady traffic continues throughout the day. However, these conditions do not excuse the rudeness and inefficiency reported not only by immigrants, but increasingly by INS officials themselves.<sup>43</sup> In the Washington, D.C. district office, a new INS director reported that he had reprimanded, suspended, and disciplined more employees than his predecessors had in the previous several years.<sup>44</sup> Unfortunately, such problems pervade many INS offices. INS mistakes compromise the ability of otherwise eligible immigrants to legalize their status, and cause other severe problems for immigrant families.

##### *INS Errors and Processing Delays Prevent Immigrant from Visiting Dying Mother*

“Ms. B-” is a Canadian scientist who came to the United States on a work-related visa. She is the inventor of a new technology for the dating of ancient objects. Ms. B- is married to a U.S. citizen schoolteacher in New York City. The couple married in 1999, and he attempted to file for permanent residence for Ms. B-. After more than one month of correspondence with two different INS offices and numerous phone calls, the couple filed Ms. B-’s application in February 1999.

While her application was pending, Ms. B- traveled to Canada to conduct work-related research. Upon returning to the United States, a border agent warned her not to leave again without obtaining “advance parole,” a permit that authorizes travel while an application is pending. Officials warned her that without it, she might be barred from returning to the United States for years. Ms. B- spent countless hours phoning the INS to establish which form she needed to apply for advance parole. She waited on hold for as long as two hours. Ultimately, she sent her advance parole application to the INS office in Vermont. This office returned it to her, stating that the form needed to be filed at the “appropriate office,” without specifying the correct office. It took two more days before she discovered this office was in New York.

In April 1999, Ms. B- learned that her 90-year-old mother was dying of cancer in Canada. The form that Ms. B- had filed stated that it would take 30 days to process. After 30 days passed, she made several unsuccessful phone calls to the INS. Ultimately, she resorted to visiting the New York office in person. She waited in line for hours, only to talk to an INS officer who slapped her papers on the counter and informed her that it now took 75 days to process parole applications.

Ms. B-'s mother died on April 24, 1999. After her death, Ms. B- returned to the INS and submitted her mother's death certificate with her parole application. The funeral was the next day. After waiting in line for hours, she finally reached the counter at 11:30 a.m., only to be told that she had to be there by 11 a.m. Another INS employee said he would see what could be done. Ms. B- then waited until 2:30 p.m., when she was told that the INS had lost her files and that they needed her to submit new photographs. She went downstairs and had new photographs taken at a shop. At 4:45 p.m. she was finally given approval for parole to travel to Canada. As would be expected, this entire process greatly upset Ms. B-. Her dying mother had told her every week in April that she hoped to see Ms. B- before she died. Ms. B- felt that she had failed her mother.<sup>45</sup>

INS inefficiency and incompetence greatly increase processing times. Advocates report that the INS returns applications with incomprehensible notations, and often loses fingerprints, documents, and files. One applicant, Tomas Rodriguez, a U.S. citizen, applied to immigrate his wife from Cuba. Initially, Mr. Rodriguez was told that the application would take

nine months to process. After a year had passed, the INS returned the application to him, stating that he needed to include a biographic information form. In fact, this form was in the package filed by Mr. Rodriguez that the INS returned to him.<sup>46</sup>

In another case, Fernando Tavera, a Miami business executive, applied for permanent residence in July 1997. Two years later, the application remained unadjudicated. The INS had lost his file, requiring him to have a new medical examination and fingerprints taken. As part of every application for lawful permanent residence, INS sends fingerprints to law enforcement officials to determine whether an applicant has a criminal record. The security clearance obtained is only valid for a limited period. Each time a fingerprint card is lost or application processing is prolonged by more than 15 months, a new clearance must be sought. Mr. Tavera is unable to travel internationally without special permission until his situation is resolved. Since he works for a multinational company, this restriction has hindered his ability to attend key meetings and has resulted in a lost promotion.<sup>47</sup> Such delays and lack of access to information plague the INS adjudications process, and separate applicants from U.S. family members for years. Even spouses and children of U.S. citizens wait for years to obtain residence because of these agency breakdowns.



### *Desperate Families Resort to Lawsuits to Speed Application Adjudications*

Some families separated by long processing times have filed lawsuits in an attempt to expedite adjudication of their applications. Mr. and Mrs. Cruz are part of one such class action law suit.

Mrs. Cruz is a U.S. citizen. Her husband is a Honduran national. They filed the application for Mr. Cruz's permanent residence in 1997. Mr. and Mrs. Cruz filed their lawsuit in August 1999 after more than 22 months had passed without a decision on the application. Meanwhile, Mr. Cruz's temporary permit to remain in the United States has expired.

Four other couples were named plaintiffs in the lawsuit. In each case, a U.S. citizen married to a foreign spouse had filed an application for permanent residence, but had received no decision from the INS for nearly two years. The local INS director attributed part of the problem to criminal background checks that now take 13 months. The official stated that the average wait in these cases in his district had grown from 6 to 18 months in recent years.<sup>48</sup>

Exacerbating the frustration applicants and their family members experience is the fact that the INS does not typically provide them with information on their long-delayed applications. Phone calls to the agency do not reach a live person, but rather a busy signal or a phone recording. In-person visits often result in applicants spending hours waiting in line only to be told that their applications are still "pending." Letters go unanswered. The lack of access to information during the painfully long delays worsens the family's situation.

### *Three-and-a-Half Years Later, Immigrant Visa Petition Filed by U.S. Citizen for Spouse Still Pending*

"Mr. and Mrs. K-" have been married for more than four years. Mrs. K- is a U.S. citizen, and Mr. K- a citizen of Sierra Leone. Mr. K-'s permanent residence application was filed three and a half years ago. Prior to his marriage, Mr. K- had filed an application for asylum in immigration court. Once he married Mrs. K-, she filed a family petition (I-130) for him. Mr. K- was scheduled to have his adjustment of status application adjudicated by the immigration judge based on the approved relative petition. At his hearing, the INS attorney cited minor inconsistencies between his testimony and the information provided on the form, and moved to revoke approval of the petition. Because the court provided no interpreter at the hearing, the apparent inconsistencies may have resulted from misunderstood questions and answers.

Two weeks later, Mr. and Mrs. K- moved to a new home. INS officers visited their home shortly after the couple relocated. The unfinished state of the apartment led the INS officers to suspect that the couple was not living together. The investigators submitted a report, and two years ago the INS sent a notice of intent to revoke Mrs. K-'s family-based petition. Mr. and Mrs. K- responded with additional documentation about the validity of their marriage. The couple submitted numerous documents proving their joint residence, joint finances, and detailed affidavits from friends and family about their marriage. After repeated phone calls and letters to the agency, the couple received a denial letter. The couple has filed an appeal of the decision, and Mr. K-'s application is still pending nearly three years later.

## B. Family Reunification but Not for the Poor

### 1. Affidavit of Support: An Overview of the Law and Its Impact

The 1996 Immigration Act included a provision of law at odds with the traditional value our immigration laws place on family unity. Under this provision, a U.S. citizen or lawful permanent resident who petitions for a family member to join him or her in the United States must now demonstrate the means to maintain an income of at least 125 percent of the federal poverty level, and must agree to maintain the intending immigrant at that level.<sup>49</sup>

The income of individuals related to the sponsor by birth, marriage, or adoption who have lived with the sponsor for at least six months may have their income counted toward the 125 percent threshold. If the petitioner cannot meet the income requirement, he or she can bridge the difference by showing assets of “five times the difference between the sponsor’s household income and the federal poverty line.”<sup>50</sup>

The intending immigrant’s income may not be counted toward the income threshold, even if it constitutes the family’s sole source of support, unless he or she has resided with the sponsor for the previous six months.<sup>51</sup> The intending immigrant’s prospective wages may never be counted.

If the petitioning family member does not meet the 125 percent threshold, he or she must obtain a co-sponsor to satisfy this requirement. The petitioner/sponsor maintains responsibility for the beneficiary until he or she naturalizes or completes 40 “qualifying quarters” of work, normally ten years.<sup>52</sup> Until then, the federal or state government can sue the sponsor to recover the cost of any “federal means-tested public benefit” used by the immigrant.

In a rather glaring irony, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“1996 Welfare Act”)<sup>53</sup> prevents immigrants who entered the country after August 22, 1996 from obtaining means-tested public benefits for five years after their entry as permanent residents.<sup>54</sup> After this five-year period, sponsor-to-alien deeming of income (attributing the sponsor’s income to the immigrant) will disqualify most immigrants from receiving benefits until they naturalize or have worked ten years. Thus, the 1996 Immigration Act prevents the admission of immigrants who might use public benefits, even

though the 1996 Welfare Act makes this virtually impossible, at least in those states that do not provide supplementary state-funded benefits.

The stated purpose of these restrictions is to screen out immigrants who might need public benefits in the United States — those “likely to become a public charge.” However, the law will prevent the admission of immigrants who could help support their families and will keep others from securing legal status and the possibility of higher-wage jobs.<sup>55</sup> In short, it will often have the opposite of its intended effect, keeping many families poor and perhaps even forcing some U.S. citizen family members to become dependent on public assistance. Of most concern, this provision could lead to further increases in the poverty rate for the children of immigrants. This rate rose from 11.9 percent in 1970 to 29.5 percent in 1997.<sup>56</sup> As stated, 75 percent of all children in immigrant families are U.S. citizens.<sup>57</sup> This provision will particularly hurt them.

The public charge ground of inadmissibility has been an integral part of our immigration laws for more than a century. More intending immigrants have been denied admission to the United States during this time based on public charge than any other ground — in fact, almost every other ground combined.<sup>58</sup> A “public charge” is now defined as someone who has or is likely to become primarily dependent on the government for subsistence, as demonstrated by the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense. Consulates and the INS must look at six factors — age, health, education, job skills, income, and the number of persons in the family — in determining, based on the totality of the circumstances, whether the intending immigrant is likely to become a public charge.

Statistics vary as to what percentage of U.S. families will be prevented from immigrating family members due to the 125 percent income and affidavit of support requirements. At the time the 1996 Immigration Act passed, many researchers predicted a tremendous reduction in family-based visas and viewed the new requirements as a back door way to limit legal immigration overall, or at least an attempt to shift immigration from low-income to middle-income families.

Relying on the 1996 U.S. Current Population Survey, the Urban Institute estimated that 28 percent of the U.S. families with native-born household heads would be unable to sponsor immigrants under the new 125-percent-of-poverty requirement. Considering only households with foreign-born heads, the percent rose

to 41. Considering only households with Mexican and Central American heads, it rose to 57 percent.<sup>59</sup>

The Center for Immigration Research at the University of Houston looked at a sample of households comprised mostly of poor Mexican-American families living along the U.S./Mexican border. In their study, the percent of households who would be unable to satisfy the 125 percent of poverty requirement was almost 70 percent.<sup>60</sup>

In a third study that looked exclusively at Dominicans and other Caribbean nationals living in the United States, researchers estimated that 40 percent would have insufficient income to immigrate their family members.<sup>61</sup> And a fourth study, conducted by the INS, which sampled all persons seeking a family-based immigrant visa in 1994, predicted that 30 percent of the families immigrating at that time would be unable to satisfy the current income requirement.<sup>62</sup>

None of these studies, however, factored in whether those households could meet the 125-percent-of-poverty requirement by supplementing income with significant assets, or could satisfy the income requirements with the help of a joint sponsor.

CLINIC itself is conducting a national survey to measure the effect of the new sponsorship requirements on clients served by Catholic Charities and other nonprofit agencies. Preliminary findings of the CLINIC study reveal the following.

First, the affidavit of support requirements have achieved their intended effect of preventing the family members of low-income permanent residents and U.S. citizens from gaining legal status and joining their families in the United States. These families do not earn enough income; they have insufficient assets; and they are unable to locate someone who satisfies the requirements and is willing to shoulder the financial responsibilities. Particularly affected are permanent residents who have been in the United States for a relatively short period of time — such as former refugees — and who lack strong family ties here or other connections. Preliminary CLINIC survey results indicate that more than 20 percent of the persons who seek assistance in immigrating family members are turned away by non-profit agencies because they lack the necessary income or assets.

Second, U.S. citizens and permanent residents rely much more heavily now on joint sponsors and household members than before the 1996 change in the law. The INS estimated that only eight percent of the visa applicants filed multiple affidavits of support

prior to 1996. That has now increased significantly, with families needing to use the income of household members and joint sponsors to satisfy the requirements. CLINIC's survey indicated that 55 percent of sponsors used the income of another household member or joint sponsor. Forty-two percent relied on a joint sponsor, and in 23 percent of those cases the joint sponsor was not related to the sponsor. Even though applicants submit joint sponsorship affidavits and similar contracts from other household members, the consulates frequently refuse to consider them.

Third, consulates unreasonably deny or delay the issuance of immigrant visas for a variety of reasons, particularly due to undercounting income or not considering certain assets. For example, consular officers fail to give weight to the sponsor's current income and consider only past income reported on the most recent tax return.

Fourth, the sponsorship requirements force families to immigrate separately and piecemeal, rather than together. This occurs because the petitioner does not earn enough to sponsor the whole family. As a result, families are being separated for longer periods of time, with some members in the United States and others remaining abroad. Or they are being delayed in legalizing the status of their members, with some family members being forced to live and work here illegally. Seventy-five percent of the agencies surveyed said that they had to resort to staggering the admission of family members, which they were forced to do in 15 percent of their cases.

Fifth, most consular officials still seem to consider low-income applicants for a family-based visa to be future welfare recipients, applying the strict, pre-1996 public charge analysis, even though the 1996 Welfare Act makes it difficult at best for immigrants to receive public benefits for years after their entry.

These preliminary survey results and individual case studies are consistent with Department of State statistics. For the first year after implementation of the affidavit of support requirements, the consulate in Ciudad Juarez was averaging about a 75 percent rejection rate for first time denials based on public charge or document insufficiency (mostly attributable to the new affidavit provision), and a 35 percent rate for final denials.<sup>63</sup> That was substantially higher than denial rates in prior years. The next year the denial rate had dropped to 40 percent for first time denials and 16 percent for final denials. Currently the consulate is reporting an 18 percent denial rate due to public charge.

Worldwide, other consulates reported similar results: the final denials for public charge doubled in the first year of implementation of the affidavit of support (from 39,000 to over 78,000) and then went down a bit in the second year (to 71,000). Workload at the consulates is up by at least 10 percent and visa issuance is down by the same amount.



Photo Courtesy: USCR

## 2. The Income Requirements of the Affidavit of Support Keep the Working Poor Separated from Their Immediate Relatives.

The affidavit of support requirements prevent the family members of low-income permanent residents and U.S. citizens from gaining legal status and joining their families in the United States. As discussed, the petitioners in these typically “working poor” families: (1) do not earn enough income; (2) have insufficient assets; and (3) cannot locate someone who satisfies the requirements and is willing to shoulder the financial responsibilities.

### *Husband of Pregnant U.S. Citizen Remains in Undocumented Status Because Wife Cannot Meet Income Requirement*

“Mr. and Mrs. L-” were married in January 2000. Mrs. L- is a U.S. citizen. Her husband, Mr. L-, is a native of the Dominican Republic. Mr. L- entered the United States with a non-immigrant visa in early 1998. The permit to remain in the United States has expired. In three weeks, Mrs. L- expects to give birth to their first child. Due to her pregnancy, Mrs. L- is unable to work. Mr. L- works as a cook in a mini-market, six days per week from 7:30 a.m. to 9:30 p.m. He earns approximately \$375 per week.

Mr. and Mrs. L- currently live with Mrs. L-’s four younger siblings, mother and step-father. In addition to supporting his wife, Mr. L- assists his mother-in-law with her living expenses. The arrival of the couple’s son will further strain the family’s financial situation. Mr. L-’s long hours illustrate his strong work ethic. But due to his undocumented status, he has been unable to find a higher paying job.

As a U.S. citizen, Mrs. L- can file an immigrant visa petition for her husband. In conjunction with the petition, her husband is eligible to file an application for permanent residence in the United States. However, an affidavit of support must accompany the application. Mrs. L- does not work and cannot satisfy the affidavit of support’s income requirement. Her mother and step-father have four dependents of their own and cannot qualify as co-sponsors. Mr. and Mrs. L- have not been able to find a relative or friend with adequate income who is willing to sign the financially binding affidavit of support. As a result, Mr. L- faces indefinite undocumented status, an uncertain future, continued exploitation by his employer, and little hope of finding a job that would allow him to support his family better.

### *Permanent Resident Mother with Cancer Cannot Satisfy the Income Requirement with Her Housekeeper’s Salary*

“Mrs. R-,” a single mother of three adult daughters, has been a permanent resident in the United States since 1991. She has worked as a housekeeper for the same employer since gaining her resident status. She has never received public

assistance. In 1991, she filed immigrant visa petitions for her adult children. All three petitions were approved. Each beneficiary has a current immigrant visa priority date. Despite the availability of the immigrant visas, Mrs. R-'s children have not been able to immigrate to the United States.

In August 1998, Mrs. R-'s oldest daughter, son-in-law, and grandchild were interviewed by a consular officer at the U.S. Embassy in Nicaragua. Mrs. R- has one son living with her in the United States. Therefore, including herself, her son, daughter, son-in-law, and grandchild, Mrs. R-'s household size is five.

In 1998, the poverty line for a family of five was \$19,250. One hundred and twenty-five percent of \$19,250 is \$24,062. In 1998, Mrs. R-'s annual income was only \$10,000. As her income did not meet the requirements under the statute, the consulate refused to issue the immigrant visas to Mrs. R-'s family. One of Mrs. R-'s daughters had a job offer from a prospective employer in the United States. Both the daughter and her husband are able-bodied and employable. They possess no characteristics such as handicaps, illness, or extreme age that would require additional public assistance or would impede their ability to work upon their arrival in the United States. However, under the law, their prospective income may not be counted toward the 125 percent requirement.

Mrs. R- has been unable to obtain a joint sponsor who has the minimum required income. Friends and family members willing to accept the legal duty to support Mrs. R-'s daughter, son-in-law, and grandchild, have modest incomes. In addition, the pool of joint sponsors available to her has been limited by the daunting legal obligations of joint sponsorship.

Mrs. R-'s youngest daughter and her two children have also been denied immigrant visas on public charge grounds. Mrs. R- was recently diagnosed with cancer. Her youngest daughter now wants to emigrate without her children in order to be reunited with her ailing mother. The daughter plans to leave her two children, ages seven and eight, with a family friend. She hopes that her mother will be able to find a co-sponsor whose income is sufficient to sponsor her.

Mrs. R- is 57 years old and has not seen her daughters in five years. She worries that she may never see her daughters or grandchildren again

and that they will never again be a significant part of her life.



Photo Courtesy: INS

### *Husband of U.S. Citizen Wife and Child Cannot Join Family in United States Because Wife Cannot Meet Income Requirement*

"Mrs. T-," a U.S. citizen, immigrated to the United States as a refugee with her family. On a return trip to Vietnam, she married Mr. T-. She returned to the United States after her marriage to continue working as a manicurist. In September 1996, she filed an immigrant visa petition for her husband. The petition was approved, but the couple has remained separated due to the unavailability of immigrant visas for spouses of permanent residents. Each year, Mrs. T- visits her husband in Vietnam for one to two months. During her last visit to Vietnam, she became pregnant. Mrs. T- gave birth to their first child in the United States in November 1999. After the child's birth, Mrs. T- was forced to stop working, as her child has struggled to gain sufficient weight. At four months, the infant weighed only nine pounds. She needs constant attention and medical care. Mrs. T- stays home with the baby in order to provide this care.

In February 2000, Mrs. T- became a citizen of the United States. As a result, an immigrant visa became immediately available to her husband. However, Mrs. T- is not working and cannot meet the income requirements imposed by the affidavit of support. Mrs. T-'s mother and brother reside in the United States. Although both work, neither earn enough to satisfy the affidavit of

support requirements. Mrs. T- lives with her mother. She is supporting herself and her newborn baby with money that she saved prior to the baby's birth. However, her savings will not last much longer.

Mrs. T- has been unable to find a co-sponsor who is willing to accept the financial obligations that accompany the affidavit of support. Until she does, she and her husband will remain separated, and Mr. T- will continue to be deprived of a relationship with his first child. Mr. T- is a fully employable adult. He works as a sales clerk in Vietnam. His admission would ease the family's financial situation.

### 3. Mistakes in Interpretation of Sponsorship Requirements

As if the new sponsorship requirements were not restrictive enough, consular officers consistently make mistakes in interpreting the law, or exercise their discretion improperly. CLINIC has discovered numerous cases where consulates have unreasonably denied or delayed the issuance of the immigrant visa due to an official's undercounting of income and not considering certain assets. The most common problem appears to be confusion over which family members must be counted as part of the household, particularly in extended households where certain family members are employed and self-sustaining.

Consular officers also fail to give weight to the sponsor's current income and consider only past income reported on the most recent tax return. "Public charge" is a prospective test for the intending immigrant, but has become a retrospective one for the sponsor. Consular officials need to consider current and future income, in lieu of past income, more than they do now.

In addition, consulates often apply the same strict public charge analysis in use prior to the 1996 Welfare Act, which all but eliminated new immigrants' access to means-tested benefit programs. In most states, for the first five years after immigrating, the immigrant is barred from receiving Medicaid, Temporary Assistance to Needy Families, Food Stamps, Supplemental Security Income, and the State Child Health Insurance Program. Some states have implemented state-funded programs that do not condition eligibility on when the applicant entered the United States, but most apply a five-year ban. After that five-year ban has run, the immigrant will be further prevented from accessing these benefits because the income of the

sponsor will be deemed to the immigrant, thus making him or her financially ineligible. Nevertheless, most consular officials still view low-income applicants as future welfare recipients, and fail to apply a test that reflects the improbability that the immigrant would be able to access means-tested benefits.

### *Faulty Immigrant Visa Denial Impedes Reunification of Permanent Resident and Son*

In 1994, "Mr. V-," a permanent resident, filed an immigrant visa petition for his son. The petition was approved in 1995. In March 1998, the son's priority date became current. In November 1998, Mr. V-'s son attended an immigrant visa interview at a U.S. consulate abroad. At the interview, Mr. V- presented a technically sufficient affidavit of support. However, the consular officer denied the visa on public charge grounds.

Mr. V- resides in the United States with his sister and brother-in-law. Counting his son, Mr. V-'s household size is four. In 1998, 125 percent of the federal poverty level was \$20,562. Mr. V- is retired, but he receives income from rental property. His sister works for a produce company. In November 1998, their income totaled \$20,268, just \$244 short of the required amount. However, Mr. V- provided evidence that his assets, including saving deposits and real estate, totalled more than \$50,000. When divided by five, as required by the regulations, the value of the assets is \$10,000. This amount was well in excess of the \$244 difference between their household income and 125 percent of the 1998 federal poverty level for a family of four. In addition, neither Mr. V- nor any of his household members have received public assistance. Mr. V-'s son is 19 years of age, and fully employable. Nevertheless, the U.S. consulate refused to issue Mr. V-'s son an immigrant visa. Correspondence from the consulate indicated that the immigrant visa was denied on public charge grounds, but gave no further explanation.

In March 1999, Mr. V- submitted a new affidavit of support with 1998 income tax and W-2 forms indicating a total household income of \$24,388. This amount excludes the value of his cash assets. One hundred and twenty five percent of the 1999 federal poverty level for a household of four is \$20,875, putting Mr. V-'s household income well in excess of the required amount. Despite submission of the affidavit to the

consulate, and repeated requests for a second visa interview, no additional action has been taken on the case. As of March 1999, Mr. V- had been separated from his son for several months, with no end in sight.

### *Consular Decision Separates Wife from U.S. Citizen Husband Who Holds Two Full-Time Jobs*

In October 1998, "Mrs. N-," the beneficiary of an approved immigrant visa petition filed by her U.S. citizen spouse, attended a visa interview at the U.S. consulate in Vietnam. Mr. N-, her husband, came to the United States as a refugee in 1992. Since that time he has been consistently employed. Mr. N-'s father, also a U.S. citizen, resides in the same city and is also employed. Mr. N- and his father do not live in the same house.

Mr. N- holds two full-time jobs. During the day he works as a manual laborer at an electronics component plant. He works a minimum of 40 hours per week at this plant. In September 1998, he began a second job in the evenings. From 4:00 p.m. to 12:30 a.m., Mr. N- works as a porter and a housekeeper at a local hospital. At the hospital, Mr. N- averages 40 hours per week.

At the immigrant visa interview in October 1998, Mrs. N- presented a technically sufficient affidavit of support. At the time, her husband's most recent income tax returns were those filed in 1997. Mr. N-'s 1997 W-2 form indicated that his annual income exceeded \$15,000. However, on the date of his wife's immigrant visa interview, this total was even higher, as he was working two full-time jobs. In 1998, 125 percent of the federal poverty line for a family of two was only \$13,562.

Although Mr. N-'s income exceeded the minimum required, the consular officer denied Mrs. N- an immigrant visa on public charge grounds. During the interview, confusion arose regarding the number of household members in Mr. N-'s house, despite the fact that the affidavit of support form clearly stated that Mr. N- lived alone. In the denial notice, the consular officer wrote that the petitioner misrepresented the number of people residing in his household, and suggested that the petitioner obtain and submit an affidavit of support from a joint sponsor.

In November 1998, Mr. N- submitted additional letters verifying his employment, copies of his pay stubs, an offer of employment from an electronics manufacturing company for Mrs. N-, a letter verifying the employment of his father, and proof that his father did not reside in the same household.

Despite several requests for information about the status of his wife's immigrant visa, Mr. N- has received no response. In June 1999, he submitted a new affidavit of support, as well as one completed by a joint sponsor. Mr. N-'s 1998 W-2 forms indicated that his total income exceeded \$23,000. One hundred and twenty-five percent of the federal poverty line for a family of two is currently \$14,063. Mr. N- clearly exceeds the minimum income requirement. Thus, while he did not need to submit an affidavit of support from a joint sponsor, he hoped that compliance with the consular officer's improper instruction would improve the chances of an immigrant visa for his wife. The joint sponsor is a single male with no dependents. According to his 1998 income tax returns, his income exceeded \$24,500. This amount is also well above the required \$14,063.

Notwithstanding these submissions and repeated inquiries to the consulate, no action has been taken on their case. Mr. and Mrs. N- remain separated more than 17 months after Mrs. N-'s initial immigrant visa interview at the consulate. Their prolonged separation is the direct result of an inappropriate consular denial.

### *Consular Officer's Failure to Consider Current Income of Immigrant Visa Petitioner Prolongs Separation of U.S. Citizen from Wife and Children*

"Mr. P-," a U.S. citizen, filed immigrant visa petitions with the INS for his wife and two children. The petitions were approved and his family was scheduled for an immigrant visa interview in 1998. At the interview, the family's immigrant visas were denied for failure to meet documentation requirements. Specifically, the consular officer requested that Mr. P- provide all schedules and attachments to his 1997 income tax return. Within one week of the denial, Mr. P- furnished the requested information, along with a new affidavit of support for each member of his family, to the U.S. consulate.

Mr. P- has worked for the same company since arriving in the United States eight years ago. His 1997 tax return indicated that he earned \$20,396 during that year. In 1998, 125 percent of the federal poverty level for a family of four was \$20,562. Mr. P-'s income for 1997 fell \$166 short of the 1998 required minimum. However, during 1998, Mr. P-'s hourly wage increased by 65 cents. Therefore, his earnings actually exceeded the amount on his 1997 tax return. Mr. P- submitted a letter from his employer verifying his raise and copies of his recent pay stubs. In addition, Mr. P- provided a letter from a prospective employer, indicating the company's interest in hiring Mrs. P- upon her arrival.

Despite the evidence submitted, Mr. P-'s family members were denied visas on public charge grounds. The denial notice stated that Mr. P-'s 1997 income was insufficient to sponsor his family members. The consular officer improperly disregarded Mr. P-'s current income and considered only his prior earnings.

After filing his 1998 tax return, Mr. P- submitted a new affidavit of support to the consulate for each member of his family. Mr. P-'s 1998 W-2 Form indicated that his annual income exceeded \$25,000. The 1999 federal poverty level for a family of four was \$20,875. Although Mr. P-'s income was well above the required amount, he has not received a response from the consulate and remains separated from his family.

### *Consulate Attaches Too Much Weight to Past Receipt of Public Benefits*

"Mr. L-," a permanent resident of the United States, filed an immigrant visa petition for his spouse of 29 years and their children. The INS approved the petition in 1992. In 1994, Mrs. L- and her children, including one U.S. citizen, returned to Mexico to wait for their priority dates to become current. In 1997, they attended a visa interview at the U.S. consulate in Ciudad Juarez, Mexico. At the interview, Mrs. L- was informed that she needed to repay the California Department of Health for the emergency medical

assistance she received during the birth of her U.S. citizen son four years earlier. In 1993, she had undergone an emergency operation due to severe complications during labor. This is the only form of public assistance the family ever received.

Mrs. L- obtained a letter from the California Department of Health indicating that she was not in debt to the Health Department, nor required to pay back the assistance she received. Mr. L- obtained a second job, working weekends as a landscaper, to bolster his income. Mrs. L- requested a second interview, at which time she presented the letter from the Department of Health, an affidavit of support signed by the petitioner, and an affidavit of support signed by a co-sponsor which met the income requirements. Again, the immigrant visa applications were denied. The consular officer wrote that the denial was based on past receipt of public benefits and the fact that the petitioner had an opportunity to change his financial situation but did not demonstrate a desire to do so. The denial had no factual basis. Two months after the second immigrant visa interview, one of the children turned 21 and fell into a different preference category than her siblings and mother.

Mrs. L- and her minor children were granted a third interview with the U.S. consulate in August 1999. A different officer reviewed their case and approved their applications for immigrant visas. Although Mrs. L- and her younger children were granted immigrant visas, the family will remain separated until the priority date for their eldest daughter becomes current.

Mr. L- has been separated from his wife and children for six years. Two of these years can be directly attributed to inappropriate consular decisions. As a result, the youngest child, a U.S. citizen, was deprived of a relationship with his father, and an older child lost her ability to immigrate with her mother and siblings.

## C. American Families with Undocumented and Other Members Who Are Subject to Bars on Admission

The 1996 Immigration Act explicitly targets the undocumented and, by extension, their families. To most families with undocumented members, the Act presents a series of hurdles that seem to block all possible avenues to legal reunification. Even spouses and minor children of U.S. citizens and lawful permanent residents often find themselves barred from permanent residence. As a result, families remain separated or they become permanently mixed status families. Ten percent of all children in the United States live in such families now,<sup>64</sup> and the 1996 Immigration Act makes it likely that the poverty rate of the children of immigrants will continue to rise.<sup>65</sup> Not only do these provisions create great hardship and uncertainty among immigrant families, but they also promote the growth of an undocumented underclass in the United States.

The provisions in the 1996 Immigration Act fuse with each other to create compound penalties. A general bar now exists for persons present in the United States without having been “admitted or paroled.” This provision applies to people who unlawfully entered or whose temporary permits have expired.<sup>66</sup> Anyone “unlawfully present” in the United States after April 1, 1997 for more than 180 days is barred from reentering the country for three years; the bar is ten years for anyone unlawfully present for a year or more.<sup>67</sup> The three- and ten-year bars apply only to persons seeking permanent residence through an application at a U.S. consulate, or to those adjusting status in the United States who left after being unlawfully present. In 1997, Congress ended the special provision that allowed applicants who entered the country illegally to pay a penalty and, in return, to receive permanent residence without leaving the United States.<sup>68</sup> As it stands, only those who began the visa application process prior to January 15, 1998 may continue to take advantage of the penalty provision and receive permanent resident status in the United States. Others will need to leave the country to obtain their visas, thereby becoming subject to the three- and ten-year bars.

The only waiver to these bars includes requirements that many immigrants cannot meet, such as having a

U.S. citizen or permanent resident spouse or parent, and being able to show extreme hardship to that relative. Further, the waiver is discretionary; there is no guarantee that those eligible will receive it. As a result, even those people with the required U.S. citizen or permanent resident relative may not be able to immigrate.

The 1996 Immigration Act also bars from permanent residence people who have ever been deported, excluded, or removed from the United States. Under prior law, this bar was five years.<sup>69</sup> Anyone deported is now barred from returning to the United States for ten years.<sup>70</sup> Those removed upon arrival, under the new “expedited removal” process, are barred for five years.<sup>71</sup> Those ordered removed or who were unlawfully present in the United States for a year or more, and who later enter or attempt to enter the country illegally, face a permanent bar, although the INS can consent to their readmission after 10 years.<sup>72</sup>

People who have previously been in immigration court proceedings receive particularly harsh treatment. Anyone who overstays an order by an immigration judge directing them to depart voluntarily from the United States, for example, becomes ineligible for most forms of relief from deportation for ten years.<sup>73</sup> Those previously in proceedings may not apply for permanent residence with INS district offices, as the jurisdiction for their cases remains with the immigration courts.<sup>74</sup> However, the law now makes reopening such cases impossible for many applicants. Under current law, most motions to reopen must be filed within 90 days after an immigration judge’s final decision on a case.<sup>75</sup> Many applicants for permanent residence develop a relationship to a U.S. citizen or permanent resident years after the judge’s decision. Even though the relative may be able to file a petition for the applicant, the application for permanent residence cannot be made within the United States, because the former court case cannot be re-opened.

The 1996 Immigration Act also provides a bar for anyone who fails to appear at an immigration hearing. The law requires that such persons must be ordered deported, and that they are ineligible for any relief from deportation for ten years.<sup>76</sup>

Some immigrants find themselves facing multiple bars for the same offense, since an infraction such as a misrepresentation to the INS constitutes a bar, and the resulting removal order creates a further bar. Under the 1996 Immigration Act, a waiver is available for applicants who can demonstrate that their absence

would cause “extreme hardship” to a U.S. citizen or lawful permanent resident spouse or parent.<sup>77</sup> The prospective hardships of U.S. citizen children do not count. The waiver is discretionary, as are all such applications. The new fraud penalties also create a permanent bar from the United States for persons who falsely claim to be U.S. citizens.<sup>78</sup> The law also bars anyone found to be a “smuggler” of undocumented persons, including people traveling with their own family members who are not receiving any compensation.<sup>79</sup>

## 1. The Inability of Undocumented Persons to Become Permanent Residents without Leaving the United States, Combined with Bars on Admission for Those “Unlawfully Present”

In November 1997, Congress chose to let die a provision of law that had allowed the qualifying relatives of U.S. citizens and lawful permanent residents to complete their permanent residence applications in the United States, regardless of their undocumented status.<sup>80</sup> Only applicants who filed visa applications before the January 15, 1998 cut-off date may still receive permanent residence without leaving the United States.

In-country adjustment of status allowed immigrant families to avoid disruption and separation during the application process. It also provided significant revenues to the government.<sup>81</sup> As a result of a \$1,000 penalty fee, the INS received \$200 million in revenues for these applications in 1997. Since the program’s termination, INS fee collections have plummeted.<sup>82</sup>

The procedure allowed tens of thousands of immigrant families to remain together, avoiding the long separations that had characterized the prior immigration system. For example, in 1996, some 80,972 spouses of U.S. citizens, 75,583 spouses and children of permanent residents, 15,523 children of U.S. citizens, 11,620 parents of U.S. citizens, 4,528 unmarried adult children of U.S. citizens, 2,546 siblings of U.S. citizens, and 1,677 married children of U.S. citizens obtained permanent residence through this process.<sup>83</sup>

Immigrants who formerly could have become permanent residents without leaving the United States are now forced to leave the country to secure their visas, thus falling prey to bars on admission. Most prominently, the three- and ten-year bars for



Photo Courtesy: Bill Frelick, USCR

“unlawful presence” will apply to them.<sup>84</sup> This confuses immigrants attempting to navigate the immigration system. In essence, they must leave the country to apply for permanent residence, because the law requires it, but the law also creates a new penalty that prevents their return. Faced with these options, many have decided to forgo a trip abroad and their opportunity at permanent residence.

The three- and ten-year bars have been broadly interpreted to include immigrants with expired permits or who entered the United States without a visa, as well as those in immigration proceedings.<sup>85</sup> Of course, any person in an immigration proceeding is required by law to appear.<sup>86</sup> Nonetheless, the INS has decided that such people, while meeting their legal responsibilities, are unlawfully present.

The only waiver for the three- and ten-year bars is for

those who can prove that, in their absence, a U.S. citizen or permanent resident spouse or parent would suffer “extreme hardship.”<sup>87</sup> INS enjoys discretion to grant or deny this waiver, but nearly four years after passage of the 1996 Immigration Act the agency still has not published regulations guiding adjudication of waiver requests. Regardless, no waiver is available based on the hardship a parent’s absence would cause a U.S. citizen or lawful permanent resident child. Because of this and other statutory restrictions, many families will not meet the requirements for the waiver.

The 1996 Immigration Act precludes court review of the discretionary decisions on these waivers.<sup>88</sup> The INS also decided that the waivers could not be filed prior to the time that the applicant is actually found “inadmissible” during their consular appointment overseas.<sup>89</sup> Thus, applicants who know they will be facing this bar cannot file the waiver application in advance and must wait abroad for whatever period the INS takes to adjudicate the waiver. In Ciudad Juarez, which processes more immigrant visas than any other post, this process typically takes between nine to twelve months; it is even longer in some locations.<sup>90</sup>

The interplay between the three- and ten-year bars and the inability to obtain permanent residence without leaving the United States leaves undocumented persons who are otherwise eligible for family-based immigrant visas with a Hobson’s choice: return to their countries, leaving their families, jobs and the lives they have built in the United States, or remain undocumented and abandon hope for permanent residence. Those who opt to leave do so with no guarantees that they will be allowed to return and, even if they receive a waiver, face a considerably longer period of separation from their families. Those too frightened or otherwise unwilling to endure such separations become part of a growing underground of permanently undocumented persons who are subject to exploitation and abuse. Either way, their families suffer.

Finally, the absolute requirement that applicants for permanent residence travel abroad to complete their applications causes great suffering for people who cannot physically withstand an extended stay in another country while separated from their families and support networks. Since the expiration of the in-country adjustment of status provision, even persons with severe health problems must travel abroad if they are to complete their applications for permanent residence.

## *U.S. Citizen Faces Economic Hardship and Indefinite Separation from Her Husband Who Must Leave the United States to Secure His Visa*

In the early 1990s, “Mr. C-” accompanied his parents and siblings to the United States from Mexico. The family entered the country illegally. Mr. C- completed high school and college in the United States and married a U.S. citizen early in 1999. Shortly after their marriage, Mrs. C- filed an immigrant visa petition on behalf of Mr. C-. The petition is pending. As a result of his illegal entry, when Mr. C-’s petition is approved, he will have to return to Mexico for his visa. If he fails to receive a waiver, he faces a ten-year bar on admission based on his unlawful presence in the United States. If he receives the waiver, current backlogs at the consulate mean he will still spend at least nine months separated from his wife.

Mr. and Mrs. C- had been employed full-time at the same auto repair shop. Mr. C- earned \$14.50 per hour as a manual laborer and Mrs. C- \$12.50 per hour as the office manager. When they learned that Mr. C- would have to return to Mexico to complete his permanent residence application, the couple decided to return to Mrs. C-’s hometown. Mrs. C- could not afford to maintain the couple’s home without her husband’s income. She and her husband currently live with her parents. Mrs. C- has found a new job, but she only earns \$7 an hour. Mr. C- assists his father-in-law on a full-time, but voluntary basis, in his small moving business. Mr. and Mrs. C- are waiting for his visa petition to be approved. After approval, Mr. C- will leave the United States to complete the permanent residence process. In anticipation of Mr. C-’s prolonged absence, the couple have given up their home and careers.

## *Father of U.S. Citizen Son and Spouse of U.S. Citizen Faces Possible 10-year Bar to Admission*

“Mr. I-” is a citizen of Mexico who has been living in undocumented status for nine years. He entered the United States in 1991 as a 14-year-old. Mr. I- graduated from high school and attended college in the United States. In February 1999, he married a U.S. citizen. The couple has a U.S. citizen son, who was born in April 1999. Mrs. I- filed an immigrant visa petition for Mr. I- in July 1999. Since her appli-

cation did not meet the January 14, 1998 deadline for in-country adjustment, Mr. I- is not eligible to apply for permanent resident status in the United States. Instead, he must submit his application to the U.S. consulate in Mexico. He has accumulated more than one year of unlawful presence and will therefore trigger a ten-year bar if he leaves the United States.

In one respect, Mr. I- is fortunate: he can apply for a waiver based on his marriage to a U.S. citizen. However, the waiver remains discretionary, and the family cannot predict the outcome of the application. At a minimum, the family will be separated for nine months, as the INS generally requires this much time to adjudicate a waiver.

Mr. I- earns \$700 per week as an electronics salesman. Mrs. I- has been caring for their son at home since his birth. The couple had hoped not to put their son into day care at such a young age, but that is what they will have to do if Mrs. I- must return to work. The couple would also lose their medical insurance from Mr. I-'s job. They are distraught at the prospect of their long separation, and have suspended all plans for the future until the situation can be resolved.

### *Spouse of U.S. Citizen Remains Undocumented in Order to Avoid Ten-Year Bar to Admission*

“Mr. M-” has made the difficult choice to forgo submitting an application for permanent residence, even though he is eligible to apply for it through his U.S. citizen spouse. Mr. M- came to the United States from Mexico without a visa more than nine years ago. He is the stepfather to Mrs. M-'s two U.S. citizen children, ages 15 and 16. Both husband and wife work full-time. Mr. M-'s income is essential to the support of the family. Mr. and Mrs. M- lived together for several years before they married in 1998. Mrs. M- filed a relative petition for her husband in early 1999, after the cut-off date for in-country adjustment of status.

Mr. M-'s only alternative is to apply for permanent residence through the U.S. consulate in Mexico. However, if he departs from the United States, he will trigger the ten-year bar to readmission, since he has been unlawfully present for more than one year. Mr. M- can apply for a waiver, based on the hardship that his departure would cause his U.S. citizen spouse. However, he

fears that the INS might deny his request by finding his hardship not “extreme” enough. In his absence, his family's income would decrease by half, and the duties of running the household would fall on his wife.

In order to avoid these consequences, Mr. M- has decided to remain in the United States in undocumented status. His decision puts his family at great risk. If apprehended by the INS, he will be subject to deportation. As an undocumented person, Mr. M- can also count on scant employment security, no health insurance, and few advancement opportunities in his work.

### *Spouse of U.S. Citizen Forced to Travel Abroad to Apply for Permanent Residence Even Though Diagnosed with Terminal Cancer*

“Mr. and Mrs. C-” married in 1995. Mr. C- is a U.S. citizen. They have a U.S. citizen child, born in 1997. Mr. C- filed a relative petition for Mrs. C- in August 1999. The same month, Mrs. C- was diagnosed with terminal cancer and underwent an emergency bone-marrow transplant. Because the relative petition was not filed before the cut-off date for in-country adjustment of status, Mrs. C- cannot file her application for permanent residence in the United States, no matter how poor her health may be. Instead, she must spend no less than nine months, and possibly more than a year, processing her application for permanent residence at the U.S. consulate in Mexico. Since she has not had immigration status in the United States, leaving the country will trigger the 10-year bar to readmission. She must therefore apply for a waiver based on the extreme hardship her departure would cause Mr. C-. As a practical matter, Mrs. C- is too weak and too much in need of medical treatment to withstand such a trip. Her undocumented status in the United States further complicates her medical condition by limiting her access to much-needed medical treatment.

### *Immigrant Barred from Visiting Dying Parent*

Undocumented persons eligible to become permanent residents without leaving the United States cannot travel abroad even in an emergency, because their departure might trigger the three- and ten-year bars. “Mr. I-” came to the United States from Peru in 1991 with a

visitor's visa. In 1992, he was offered a position as a kitchen helper in a restaurant. His employer filed a labor certification application on Mr. I-'s behalf with the Department of Labor and the application was approved. The employer then filed an employee petition with INS, seeking to classify Mr. I- as an intending immigrant. INS approved that petition. There is a long waiting period in Mr. I-'s visa category, and he waited almost seven years before the INS could accept his application for permanent residence. In 1997, Mr I-'s father died in his home country. At that time, Mr. I-'s application was still backlogged, so he could not yet file his application for permanent residence. Nor could he ask the INS for permission to travel. Because he could not leave the country without losing his ability to pursue his residence application, he missed the funeral.

In 1998, after a long wait, Mr. I- was close to becoming eligible for permanent residence processing. However, at that point, Mr. I- received a letter notifying him that his mother was dying from cancer in Peru. He desperately wanted to see her before she died.

The INS allows applicants for permanent residence to apply for a travel document they can use in the event of such an emergency, called "advance parole." However, the one-time travel permit does not protect the traveler from inadmissibility under the three- and ten-year bars. Thus, Mr. I-'s departure would have triggered a ten-year bar, even if he had left with advance parole. In addition, he is ineligible for a waiver because he lacks the qualifying relative. Faced with a ten-year bar, Mr. I- opted not to visit his dying mother.

### *U.S. Citizen is Separated Permanently from Spouse Who Returned to Her Home Country for Five Days to Attend Her Father's Funeral*

"Mrs. R-," a citizen of Mexico, married Mr. R-, a naturalized U.S. citizen, in 1989. The couple has two U.S. citizen children, and a third child who is a permanent resident. The INS approved Mr. R-'s relative petition for Mrs. R- in April 1997. In October 1997, Mrs. R- filed her application for permanent residence. Almost two years later, the INS still had made no decision on the application. In January 1999, Mrs. R-'s father died. She immediately left for Mexico for five days to help arrange and attend the funeral. After she went, Mr. R- visited the INS to inquire as to the steps the couple should take to ensure Mrs. R-'s return. An INS official said that Mrs. R- should come to the INS office as soon as she returned.

Upon her return, Mrs. R- went immediately to the INS. Agency officials then denied her application for permanent residence, stating that she had abandoned it by leaving the country. They placed her in removal proceedings, charging her with a permanent bar for having one year of unlawful presence and then reentering the United States unlawfully. They also charged her with a ten-year bar for having been unlawfully present for more than one year. Although Mrs. R- may apply for a waiver of the ten-year bar based on extreme hardship to her U.S. citizen husband, she cannot waive the permanent bar. The immigration judge will have no choice under the law but to order Mrs. R- deported from the United States.

## **2. Immigrants Who Have Been Unlawfully Present in the United States for More Than One Year, Who Leave and Then Reenter or Attempt to Reenter Illegally**

Persons who have been undocumented for more than one year after April 1, 1997, who leave the country and then reenter or attempt to reenter unlawfully, face a permanent bar on readmission.<sup>91</sup> This bar cannot be waived, even in the case of serious hardship to U.S. citizen or permanent resident relatives. After ten years, however, the Attorney General (through the INS) can issue a pardon in such a case.<sup>92</sup> This permanent bar heavily impacts the relatives of U.S. citizens and permanent residents who would otherwise qualify for a visa.



Photo Courtesy: INS

### 3. Five-Year Bar on Admission for Those Removed Under Expedited Removal Procedure

Under the new “expedited removal” process created by the 1996 Immigration Act, persons arriving at a United States border without proper documents can be summarily removed from the country and barred from reentry for five years, with only minimal procedural protections.<sup>93</sup> The authority to place arriving immigrants in this process lies with low-level INS officials and, not surprisingly, has been exercised so expansively that it has even led to the removal of U.S. citizens.<sup>94</sup> In 1998, more than 30,000 people were removed under this process.<sup>95</sup> They are unable to reenter for five years, absent a special pardon from the INS.<sup>96</sup> These include family members of U.S. citizens and permanent residents, as well as visiting relatives who wish to come temporarily to the United States.

### *Canadian Citizen Barred from Reuniting with U.S. Citizen Husband for Five Years*

Mrs. Sutton, a citizen of Canada, is married to a U.S. citizen living in Florida. The two were returning from a trip to Toronto when Mrs. Sutton was stopped and questioned by the INS at the border. The officers said that Mrs. Sutton lacked a proper visa, placed her in expedited removal, and informed her that she would be barred from returning to the United States for five years. After her removal, Mrs. Sutton discovered that she and Mr. Sutton were expecting a baby. Mr. Sutton considered moving to Canada, but is reluctant to leave his job with the U.S. Postal Service, particularly when the family faces so many new expenses. As of March 2000, the couple had been living apart for 14 months. Because the couple must maintain two households and Mr. Sutton must drive 3,000 miles round trip to visit his wife, the family's finances have been severely strained. Mr. Sutton works 60 to 70 hours per week and has a second job in a painting business. Mr. and Mrs. Sutton have applied to the INS for a pardon, but they have not yet received a decision.<sup>97</sup>

### *Mother Trying to Visit Children in United States Is Strip Searched Four Times, Jailed for Three Days, and Summarily Removed to Venezuela*

Mary Nelly Pose de Torrealba, a national of Venezuela, arrived at Miami International Airport in 1997 with a visitor's visa. She came to visit her children, who are students in the United States. She had made other temporary visits to the United States on her visitor's visa. The U.S. consulate issues multiple-entry visitor's visas that can be used repeatedly over several years. Each time, however, the visitor must submit to an examination by the INS. The last time Mrs. Torrealba attempted to enter, the INS detained her for questioning, subjected her to four strip searches, refused her access to a telephone or a lawyer, and did not allow her to contact her husband. An INS officer informed her that she had no rights, and urged her to sign a statement admitting that she had attempted to enter the United States fraudulently. When she asked what the statement meant, the officer told her to be quiet and to sign. Worn down after three days in jail, Mrs. Torrealba signed the statement and was removed to Venezuela. She was told that if she

attempted to come back, she would be jailed for 20 years. Mrs. Torrealba does not blame the U.S. government for what happened to her; rather, she is convinced that these acts were committed by misguided individuals.<sup>98</sup>

### *Teenager Detained, Refused Contact with U.S. Relatives, and Then Deported to Mexico City*

Graciela Meza, an 18-year-old Mexican citizen, was detained for hours in Houston after arriving at the airport with a visitor's visa, then jailed overnight and removed to Mexico City. She had come to the United States to visit her sister, a permanent resident married to a U.S. citizen. Ms. Meza had hoped to visit her sister and the couple's new baby before returning to Mexico to start college. She had already visited her sister once before and had returned to Mexico when her visitor's visa was still valid. Although her visitor's visa remained valid, the INS questioned her upon arrival and insisted that she was coming to work illegally as a babysitter. Despite her assurances that any child care she might give to her sister's baby would be voluntary and unpaid, the INS summarily removed her to Mexico. Prior to her removal, the INS officers tried repeatedly to get Ms. Meza to sign a statement saying she had tried to enter the United States illegally. After refusing to do so for many hours, she relented and signed.

Ms. Meza had been traveling with her sister when they arrived in Houston. She was separated from her sister and taken to an INS jail, with no baggage and no cash. Ms. Meza spent the night sleepless and terrified in jail, sitting on a mattress on the floor. Her sister and brother-in-law contacted the INS and requested to see Ms. Meza, so that they could at least give her some cash to take care of herself once she arrived in Mexico City. Ms. Meza was allowed to make one phone call during her night in jail. She called her sister and relayed her flight information to her. At the airport the following morning, Ms. Meza's sister was allowed to hand her some cash as the INS officer escorted her on to the flight.<sup>99</sup>

### *Spouse and Father of U.S. Citizens Summarily Removed, Empoverishing His U.S. Family*

"Mr. P-," a citizen of Tonga, came to the United States on a visitor's visa in 1992 to visit his uncle. His uncle helped him complete what he thought

was an application for permanent residence. Mr. P- received a "green card" in the mail which, unknown to him, was fake. In fact, often immigrants do not know that they have purchased false documents.<sup>100</sup> In 1994, Mr. P- married a U.S. citizen. They have one U.S. citizen child born in late 1994. Mrs. P- had one child from a previous marriage who was born in 1985. Mrs. P-'s first husband abused her and she describes Mr. P- as a "godsend."

In 1998, Mr. P- left the country to visit his mother abroad. Upon his return to the United States, his fraudulent green card was confiscated. He was placed in expedited removal proceedings and summarily removed from the United States. Mrs. P- had never filed a family-based immigrant visa petition on Mr. P-'s behalf, since they had believed that he had a valid green card. Mrs. P- could not see her husband prior to his removal to Tonga.

After Mr. P-'s removal, Mrs. P- filed an immigrant visa petition for him with the INS, which was approved. Almost a year after his removal, Mr. P- was scheduled for a permanent residence interview at the U.S. consulate. Because he had been removed, Mr. P- also had to submit an application for a pardon. Given his prior unlawful presence in the United States, he also needed to file a waiver application to avoid the ten-year bar on admission. Both the pardon and waiver applications were forwarded to the nearest INS office in Manila. In August 1999, five months later, the INS denied the applications. Mr. P- filed additional evidence of hardship and resubmitted the applications in an administrative appeal. The appeal remains pending.

Since her husband's removal, Mrs. P- has had to move to cheaper accommodations. Mr. P-'s income had been an important part of the family's support. Mrs. P- works full-time as a pharmacist, and is looking for a second job to supplement the family's income. The long hours she spends at work leave her little time to spend with her two children. Since her step-father's removal, their teenage daughter's grades have plummeted. Mr. P- was the first real father figure she ever had. The couple's five-year old son remains bewildered by his father's absence.

Mrs. P- cannot afford to visit her husband, though her phone bill averages \$200 per month. She suffers from depression, anxiety and diabetes. Her physician has warned that her current lifestyle poses a threat to her health.

#### 4. Bars to Admission for Misrepresentations and False Claims to Citizenship

The 1996 Immigration Act narrowed the already limited waivers available to persons who commit fraud or willfully misrepresent a material fact to obtain an immigration benefit.<sup>101</sup> The law prior to 1996 included a bar to admission for persons who committed fraud or made a material misrepresentation, but this could be waived if it took place more than 10 years before. This waiver no longer exists, and persons can now be found inadmissible based on misrepresentations that they made at any time in the past.<sup>102</sup> A narrow, discretionary waiver did survive the 1996 Immigration Act for immigrants with a U.S. citizen or permanent resident spouse or parent, provided they can show their qualifying relative would experience “extreme hardship.”<sup>103</sup> However, immigrants cannot secure a waiver based on the hardship that their absence will cause their U.S. citizen children.

The 1996 Immigration Act also created a permanent bar, with no possibility of a waiver, for persons who make a false claim to U.S. citizenship.<sup>104</sup> This bar exists for anyone who falsely claims to be a citizen after September 30, 1996. Its impact falls disproportionately on families in border communities, whose members frequently travel to and from Mexico.

##### *Teenagers with Pending Family-Based Visas Petitions Who Have Lived in the United States Since Infancy Face Permanent, Non-Waiveable Bar to Admission Based on Claims to Citizenship on Their Return from Visiting Family in Mexico*

“M-” and “J-,” ages 20 and 21, have resided in the United States since infancy. They were brought to the United States by their mother, at the ages of six months and one year. They have lived in a border community in the United States their entire lives, frequently returning to Mexico during holidays and on school vacations to visit relatives. Their mother is a permanent resident. She is currently married to their step-father, a U.S. citizen. M- and J- have completed all of their education in the United States. Although they speak Spanish, they do not write it. Both have led exemplary lives, and neither has ever had a problem with the law.



Photo Courtesy: INS

In June 1999, they completed their high school studies, and both were offered scholarships to state universities. Unfortunately, because M- and J- had not secured their permanent resident status, they were not eligible to pursue their studies. Shortly after their U.S. citizen step-father filed visa petitions for them, M- and J- went to Mexico to spend an evening with relatives. Upon their return, they told INS inspectors that they were U.S. citizens. INS officials checked their records and discovered that this was not true.

M- and J- were found inadmissible for making false claims to U.S. citizenship and were immediately removed with no notification given to their parents. They are now permanently inadmissible to the United States, the only country they have lived in since infancy. Should they attempt to illegally reenter the United States, their prior orders of removal will be reinstated and they could face criminal prosecution.

M-'s and J-'s cases present a common fact pattern in border communities. Although they have some relatives in Mexico, they have lived almost their entire lives in the United States and were in the process of becoming permanent residents.

## *Wife of U.S. Citizen Denied Admission Because of a Misrepresentation to INS Officials*

“Mr. H-” is a U.S. citizen. He fell in love and married Mrs. H- in the Philippines in October 1996. Prior to their marriage, on a trip to Canada, Mrs. H- went to the U.S. consulate and applied for a visitor visa to the United States. Her application was denied. She resubmitted the application with more documentation and it was denied again. The couple then decided to drive to the United States. When they reached the border at Fort Champlain, New York, Mrs. H- told the INS official that she was a U.S. citizen. She was charged with fraud and refused entry. The couple was advised that the only place that they could file for Mrs. H-’s admission was at the U.S. consulate in the Philippines. Mrs. H- returned to Canada, and then to the Philippines, where Mr. H- filed a relative petition and permanent residence application for Mrs. H- at the U.S. consulate. Although the petition was approved, the consulate denied her application for permanent residence on the grounds that she had committed fraud. Mrs. H- was able to apply for a waiver because she had the necessary qualifying relative, a U.S. citizen spouse. However, she needed to prove that her husband would suffer extreme hardship if she could not join him in the United States. The INS denied her waiver, stating that “separation and financial difficulties ... in themselves, are insufficient to warrant approval of an application.” Mr. and Mrs. H- have appealed this denial.

Mr. H-’s income does not allow for frequent trips abroad, so the couple has remained separated. Had Mrs. H- claimed to be a citizen after September 30, 1996, under the 1996 Immigration Act, she would have been charged with a bar to permanent residence for which no waiver exists, regardless of her marriage to a U.S. citizen.

## **5. Bar to Admission for Those Who Have Unlawfully Voted**

The 1996 Immigration Act created a bar to admission for those who have illegally voted,<sup>105</sup> and also made illegal voting a ground of deportation.<sup>106</sup> Immigrants who believe that they are U.S. citizens, particularly those who arrived in this country as children, often mistakenly vote.<sup>107</sup> There is no waiver available to this bar for good-faith mistakes. However, the INS has recently recognized that it can exercise its prosecu-

torial discretion not to remove such persons and to allow them to naturalize.<sup>108</sup>

## *Woman Adopted by U.S. Citizen Parents at Age Eight, Who Mistakenly Believed Herself to Be a U.S. Citizen, Faces Possible Removal for Illegally Voting*

At the age of eight, “Mrs. C-,” a national of Korea, was adopted by two U.S. citizens. Since that time, she has resided in the United States. Today, she has two U.S. citizen children of her own. They are 8 and 14 years of age. She owns and operates a day care business.

Before a recent trip to Bermuda, Mrs. C- had always assumed that she was a citizen of the United States. At the age of 18, Mrs. C- registered to vote. She has voted in one state and one federal election.

Upon returning from her trip to Bermuda, Mrs. C- was questioned by INS officials. She explained that she had always thought she was a U.S. citizen, and presented her old alien registration card and a re-entry permit that had been issued by the INS.

INS officials inspected Mrs. C-’s documents and informed her that her permanent resident alien registration card (“green card”) had expired. In 1996, “old” alien registration cards became invalid, as the INS had developed a new card in order to deter document fraud. After lengthy processing at the airport, Mrs. C- was permitted to return to her home in the United States.

Upon her return, Mrs. C- further inquired into her citizenship status. She learned that her adoptive parents never completed the appropriate paperwork for her to obtain a certificate of citizenship. Under the immigration laws, Mrs. C- could have received a certificate of citizenship if her parents had filed the appropriate paperwork before she turned 18.

Mrs. C- would like to apply for naturalization and become a U.S. citizen. She fears, however, that she would be charged with removability for unlawful voting. Mrs. C- has no recollection of Korea. She does not speak, read, or write Korean.

## 6. Hurdles to Legal Immigration for Persons Previously Ordered Deported

The immigration laws penalize persons who have been ordered deported or removed in the past. This includes immigrants ordered deported “in absentia,” i.e., because they failed to attend their hearing. Under current law, it is virtually impossible to reopen such cases unless the person can show “exceptional circumstances,” such as a serious illness of the person or serious illness or death of a spouse, parent or child.<sup>109</sup>

The 1996 Immigration Act also prohibits reopening prior immigration court proceedings if more than 90 days have passed since the final removal order was issued, unless the INS agrees that the case should be reopened.<sup>110</sup> Persons ordered removed who later marry a U.S. citizen or a lawful permanent resident or who otherwise qualify for a family-based visa cannot reopen their cases to apply for permanent residence. Their only alternative is to depart the United States and attempt to obtain permanent residence at a U.S. consulate abroad. However, their departure triggers the three- and ten-year bars to admission.

### *Spouse of Lawful Permanent Resident and Mother of U.S. Citizen Children Faces Separation from Family Due to Inability to Reopen Court Case*

“Mrs. L-” is a citizen of El Salvador who entered the United States in 1991. In 1993, she married a lawful permanent resident. They both live in Washington, D.C. where Mrs. L- is a housekeeper and Mr. L- is a landscaper. They have two U.S. citizen children, ages five and seven. Mrs. L- applied for asylum when she came to the United States, but the application was denied and she was placed in deportation proceedings. In 1992, she missed her hearing before an immigration judge because she could not pay her lawyer and feared the prospect of attending alone. In her absence, the immigration judge ordered Mrs. L- deported.

Mr. L- filed a relative petition for his wife in 1994, which was approved. The couple waited in the backlog for many years for Mrs. L- to become eligible to apply for permanent residence. When their new lawyer searched through Mrs. L-’s file, she discovered Mrs. L-’s deportation order. The lawyer filed a motion to reopen Mrs. L-’s immigration case, alleging that exceptional circumstances had prevented Mrs. L- from

attending her hearing. The INS opposed the motion, and the court denied it. Mrs. L-, therefore, has no alternative but to attempt to complete her permanent residence application at the U.S. consulate in El Salvador. However, this will require her to leave her two young children, whom she currently takes to her housekeeping job each day, because the couple does not have child care. She cannot afford to take her children to El Salvador with her, and the couple does not have enough money to pay for child care.

Mrs. L- faces an extended stay in El Salvador. Due to her unlawful presence in the United States, she must file for a waiver. This process currently takes about one year. Mrs. L- must also apply for a pardon due to her prior deportation order. If unsuccessful in either case, she will face a multi-year bar on admission and separation from her family. Neither Mr. L- nor Mrs. L- have any immediate family left in El Salvador.

The law now bars persons for ten years from adjustment to permanent resident status if they have failed to leave the United States under an order of “voluntary departure” by an immigration judge.<sup>111</sup> These new provisions also assess civil penalties of \$1,000 - \$5,000 against persons who overstay their voluntary departure period.<sup>112</sup> By law, an overstayed voluntary departure order automatically becomes an order of deportation, allowing the INS to remove the person immediately. The 1996 Immigration Act also created a ten-year bar to adjustment to permanent residence for anyone previously ordered deported from the United States.<sup>113</sup> Persons ordered removed often subsequently develop strong equitable ties to the United States, including lawful permanent resident and U.S. citizen relatives, making them eligible for family-based visas. Nonetheless, the multiple legal hurdles faced by such applicants may be insurmountable, even with the benefit of competent legal counsel.

### *Spouse and Stepfather of U.S. Citizens Separated from Family for Two Years*

“Mr. A-,” a Colombian citizen, entered the United States without a visa in 1990. He was arrested by the INS shortly after his entry and placed in deportation proceedings. An immigration judge ordered him to depart voluntarily from the United States within 90 days. Mr. A- did not leave, however, and the order converted into an order of deportation against Mr. A- after the prescribed period elapsed.

In 1995, Mr. A- married Mrs. A-, a U.S. citizen with two sons, ages 11 and 12. Mrs. A- had been married before, but divorced her husband after he abandoned the family. Mrs. A- filed a relative petition for Mr. A- shortly after their marriage, which the INS approved. However, since Mr. A- had a prior court case, he needed to reopen his case to apply for permanent residence. The INS opposed his motion to reopen.

Unable to apply for permanent residence in the United States, Mr. A- applied to the U.S. consulate in his home country, Colombia. The consulate scheduled Mr. A- for an appointment and he left the United States in October 1997.

The separation from his wife and stepsons dragged on for nearly two years because the consulate also required a waiver of his unlawful presence in the United States. Mr. A- applied for a waiver of the ten-year bar, based on the extreme hardship it would create for his U.S. citizen spouse, and a waiver for his previous deportation, called a "permission to reapply." The consulate continued to request additional documents, which required Mr. A- to make no fewer than 11 trips to the consulate. On various occasions, Mr. A- was told that he needed updated documents showing his financial support in the United States, a letter from the police stating how many times he had left the country, new fingerprints, and a new medical exam. The INS finally approved the waiver in December 1998. As with many U.S. consulates, there is no INS office on site and the waiver application must be sent to the nearest INS overseas office for processing, which entails further delays. The consulate did not grant Mr. A- permanent residence until July 1999. On his return to the United States after nearly two years, Mr. A-'s family owed more than \$6,000 in back rent.

The INS has strictly enforced the provision of the 1996 Immigration Act that prevents the reopening of prior immigration proceedings. The agency need not give consideration to such requests, even when there are strong humanitarian reasons, including family ties. Under the law, if the INS does not agree to the reopening, the immigration judge cannot reopen the case, and the immigrant must travel abroad to apply for permanent residence. Such persons face not only the normal six-month processing time at the U.S. consulate, but must also file waivers for any prior deportation order and unlawful presence in the United States. If any one of the waiver requests fails, the immigrant faces long-term separation from his or her family.

### *Mother Faces Separation from Two-Year-Old U.S. Citizen Twins and U.S. Citizen Husband*

In 1997, Sherol Boles, a 33-year-old woman from Barbados, married Michael Boles, a U.S. citizen who had served 12 years in the U.S. Marines. The couple now has two-year-old twins, who were born three months prematurely and require hospitalization and ongoing medical treatment. Mr. Boles filed a family visa petition for Mrs. Boles in 1997, which the INS approved after two years. Mrs. Boles is unable to complete her application for permanent residence in the United States, however, because of a prior immigration court proceeding. At that time, an immigration judge ordered Mrs. Boles to depart voluntarily from the United States. Mrs. Boles sought extensions of her departure period, which the INS granted until 1998. The INS initially treated Mrs. Boles favorably because she had agreed to testify in a criminal trial against a fraudulent "immigration advisor" in the Boston area. After 1998, the agency refused to grant her any more extensions, and her failure to depart voluntarily within the prescribed time converted into an order of deportation.

After Mr. and Mrs. Boles married, they moved to his home in Phoenix. Mrs. Boles has attempted to reopen her case in immigration court, but the INS has refused on the grounds that Mrs. Boles' departure would not lead to irreparable injury and extreme hardship. In fact, if Mrs. Boles must leave the United States to apply for permanent residence, her husband could not possibly take care of the twins by himself. If she takes them with her, the medical care they need may not be available in Barbados. If she leaves the country, Mrs. Boles will face a ten-year bar on readmission due to her unlawful presence and a concurrent ten-year bar for the order of deportation. She must successfully complete waivers for these bars, in addition to meeting the normal requirements for permanent residence. Since these waivers are discretionary, the INS might well deny her requests for them, as they did her request for reopening her case.<sup>114</sup>



Photo Courtesy: USCR

## 7. The Evisceration of Relief from Removal Based on Family and Other Equitable Ties in the United States

Under prior law, undocumented persons facing deportation could often regularize their status, provided they could demonstrate strong equities in the United States, including strong family ties. This form of relief from removal was known as “suspension of deportation.” In order to qualify, a non-citizen had to show that he or she had resided in the United States for seven years, was a person of “good moral character” during that time, and that his or her deportation would cause extreme hardship to them or to a U.S. citizen or lawful permanent resident spouse, parent, or child.<sup>115</sup> The 1996 Immigration Act replaced suspension of deportation with a narrower form of relief called “cancellation of removal.” This relief is available to persons present in the United States for ten years who demonstrate good moral character during that time, no convictions for any of a range of stipulated crimes, and that their removal would result in “exceptional and extremely unusual” hardship (a higher threshold) to a U.S. citizen or lawful permanent

resident spouse, parent or child.<sup>116</sup> Hardship to the non-citizen applicant can no longer be taken into account.

### *Teenager Who Entered the United States at Age Two Faces Removal to a Country He Does Not Know*

Jefferson Carranza has lived in the United States for 17 years, since his mother brought him from Mexico as a two-year-old. Mr. Carranza has lived in undocumented status for the entire time. In 1992, his mother became a lawful permanent resident and filed a family-based immigrant visa petition on her son’s behalf. Because of the long backlogs, his visa did not become available until 1998. At that time, an INS investigation revealed that Mr. Carranza’s mother had a drug conviction from 1995. The INS placed the mother in deportation proceedings, and revoked the approval of Mr. Carranza’s visa petition. Under the law prior to 1996, Mr. Carranza would have been eligible for relief from deportation based on the hardship he would face if deported. This is now no longer legally relevant; it does not matter that he has attended school here, has no memories of Mexico, has lived all but two years in the United States, and works to help support his grandmother and his twelve-year-old sister.<sup>117</sup>

## 8. The Potential Impact of Civil Document Fraud Provisions

In 1990, Congress added an important provision of law that imposed severe penalties on immigrants who use, purchase, possess, or accept a false document in order to gain an immigration-related benefit.<sup>118</sup> Six years later it expanded this provision to include putting false information on a valid document, such as an I-9 employment verification form.<sup>119</sup> The consequences of a finding of civil document fraud include fines, permanent inadmissibility, deportation, and even incarceration.

Any immigrant who is the subject of a final order for violating this provision is inadmissible to the United States.<sup>120</sup> The 1996 Immigration Act added a limited discretionary waiver for: (1) lawful permanent residents who temporarily proceeded abroad voluntarily, are not under an order of deportation, and are otherwise admissible; and (2) those seeking admission or adjustment of status based on immediate relative or family-based preference petitions.<sup>121</sup> In either case, the immigrant must not previously have been fined for a document fraud violation and the fraud must have

been committed “solely to assist, aid, or support the alien’s spouse or child.” The meaning of this last requirement is not clear, but it could be defined narrowly to apply to illegal employment or similar actions whose purpose was to support the child or spouse. The waiver applies retroactively to cover final orders issued or conduct occurring prior to the 1996 Immigration Act.

Any person subject to a final order for violation of the document fraud provision is also deportable.<sup>122</sup> A limited waiver is available to lawful permanent residents not previously fined for document fraud who committed the offense “solely to assist, aid, or support the alien’s spouse or child.”<sup>123</sup>

The 1996 Immigration Act also added a provision aimed at unlicensed, as well as licensed, practitioners who assist clients with falsely-made applications and fail to disclose their role in providing such assistance. They are subject to possible fines and a maximum term of imprisonment of up to five years. In addition, they are “prohibited from preparing or assisting in preparing” any such application.<sup>124</sup> Subsequent violations subject the person to potential imprisonment of up to 15 years.<sup>125</sup>

The INS waited until 1994 to begin implementation of the document fraud provision, and even then only enforced it in certain limited geographic areas. Nevertheless, over the next two years, approximately 7,000 persons were charged with committing civil document fraud, the vast majority of whom waived their right to a hearing and were issued a final order. Most of those were charged with having submitted false documents in order to obtain employment. At the time, they were not adequately notified of the consequences of a final document fraud order; the notice forms were not in their native language and they addressed only the civil money penalties, not the fact that the person could be deported and permanently inadmissible.

Advocates filed a nationwide class action in 1995 that successfully challenged, on due process grounds, the INS’s failure to provide adequate notice of the rights, responsibilities, and consequences in the document fraud process. On March 13, 1996, a district court in Seattle entered summary judgment for the plaintiffs.<sup>126</sup> The court enjoined the INS from using the current notice forms, ordered the agency to draft a new form that provides meaningful notice, stopped the deportation of any class member based on a final order of document fraud, provided for the reopening of final orders entered in violation of due process rights, and

set forth a procedure for non-citizens outside the country to be paroled in for any hearing on document fraud proceedings. The court later issued a permanent injunction, which was upheld on appeal.<sup>127</sup> For over four years, during the pendency of the appeals, the agency has been enjoined from enforcing this provision.

At this time, the parties to the litigation are close to reaching a final settlement, which will essentially vacate all document fraud final orders that were issued, return any fines collected, and provide relief to class members ordered deported based on a finding of civil document fraud. The INS will then be free to recommence enforcing this section of the law through the use of new notice forms that adequately explain the rights, remedies, and consequences of a document fraud order.

The possibility of full-scale enforcement of the document fraud provision is troubling to advocates who are familiar with the number of potential persons who could be affected. The use of false documents to obtain or retain employment is widespread throughout most immigrant communities. In immigrant-dense jobs like meatpacking, an estimated 25 percent of the workforce lack proper documents.<sup>128</sup> In addition, Congress has eliminated many of the traditional ways that immigrants qualified for employment authorization. For example, asylum applicants are now barred from working in the United States for at least 180 days after applying for asylum.<sup>129</sup> Many persons in removal proceedings who are challenging their deportation are left without the ability to obtain employment authorization. Persons who are allowed to remain in this country through a grant of “voluntary departure” are similarly prohibited from working legally.

Even in situations where the law does allow for the granting of employment authorization, the INS is often slow in granting a work permit. For example, newcomers who qualify for benefits under the “Family Unity” program, which grants temporary benefits to family members of legalized immigrants, have had to wait two to three years for an employment authorization document. Hondurans who applied for work authorization last year under the temporary protected status (TPS) program typically waited six to nine months before receiving the permit. Spouses of U.S. citizens who have applied for work authorization in conjunction with an application for adjustment of status must also endure long delays in many INS districts. As a result of these delays, many people are forced to work illegally while waiting for their

employment authorization to be approved. Others who qualify for a work permit are discouraged from even applying for one.

If the INS begins aggressive, nationwide enforcement of civil document fraud, a large percentage of the immigrants who are in line for an immigrant visa or

some relief from deportation will be precluded from ever legalizing their status. Although the law does provide the possibility of a waiver in some cases, few of those now working illegally in the United States will qualify. In short, enforcement of this provision could prevent thousands of family members from reuniting.



Photo Courtesy: Laura Burdick

## D. Reinstatement of Removal

The 1996 Immigration Act devastates families with members who, at some point in their lives, reentered the United States after having been removed. This group is potentially quite large. In 1999, for example, the INS removed 176,990 persons, and immigration judges ordered an additional 72,000 to depart “voluntarily.”<sup>130</sup> Under the relevant provision, if any of these persons illegally reenter following their removal, their prior order of removal will be automatically reinstated without a hearing.<sup>131</sup> In addition, they will be summarily removed and permanently barred from admission, without reference to their family ties in the United States.

This provision of law triggers one of the harshest of immigration punishments — immediate removal — and strips individuals of legal and procedural protections. It also punishes those who unwittingly “self-deport” by leaving the United States after the time granted to them by an immigration judge.

The implications of this law for the foreign-born are even more troubling when considered in conjunction with other parts of the immigration laws. Not only does this provision allow the INS to remove the individual in summary fashion, but our immigration laws forever deny his or her reentry to the United States. The law combines draconian removal procedures with a permanent denial of legal immigration benefits to those who have ever effected an illegal reentry into the United States, no matter the circumstances of entry.<sup>132</sup> Even those forced to reenter for compelling family reasons are barred forever from immigration benefits.

Without any chance of legalizing their status in the United States, newcomers must either leave the United States and face an uncertain future in their native countries or stay and join an undocumented underclass. Either way, their families suffer.

## I. The Impact of Reinstatement of Removal on American Families

These laws most frequently hurt immigrant families with U.S. citizen and lawful permanent resident members. Stripped of their access to immigration remedies, such as “Family Unity,” adjustment of status, cancellation of removal, and suspension of deportation, these families must endure permanent separation from their spouses, parents, or children without consideration given to any equitable factors or to their particular circumstances. The law does not consider, for example, the age of the deportation order or the reasons for the illegal entry. To make matters worse, no court has the authority to review the INS’s decision. Persons subject to “reinstatement” must make painful choices about their family’s future, with none of the options good ones.

American families in which removed immigrants are the main breadwinners will suffer a particularly tragic and ironic fate. Without a stable, principal income, their economic well-being will be imperiled, as will their psychological health and stability. These laws will force many U.S. citizen children and spouses to sustain themselves on public benefits and to use costly emergency health care.

### *Reinstatement of Removal: Broken Families and Painful Choices*

At the age of 15, “Mr. X-” entered the United States from Mexico without documents. He was apprehended upon entry, and after a brief hearing before an immigration judge, was granted voluntary departure. Mr. X- was required to leave the United States by the end of December 1990, six months after his entry. After his hearing, an attorney erroneously advised Mr. X- that he might be eligible for Family Unity relief under the 1986 legalization program.<sup>133</sup> The attorney subsequently filed an application for relief, and, while it was pending, he also filed for an extension of the voluntary departure period. The INS failed to respond to either application. Fearing the effects of remaining in the United States unlawfully, Mr. X- returned to Mexico on his own initiative in January 1991. He did not

realize that despite his best efforts to comply with the immigration laws he had self-deported.

Two years later, in 1993, Mr. X- reentered the United States and found a job as a landscaper. Four years after that, he married a U.S. citizen. Mr. X- is the devoted step-father to Mrs. X-'s now seven-year-old son from a previous marriage. In January 1997, Mr. X- applied for permanent residence in the United States based on his marriage to a U.S. citizen. Without considering his application, the INS immediately moved to reinstate Mr. X-'s deportation. If his previous deportation order is reinstated, Mr. X- will be immediately removed from the United States. He will not have the right to apply for any relief from deportation, nor will he be afforded any further review of his case. Also, Mr. X- will never be able legally to enter the United States.

While his case is pending, Mrs. X- and their son live with great fear and uncertainty. Mr. X- is the family's main source of financial support. Mrs. X- works as a jeweler on a sporadic basis, but mainly relies on Mr. X-'s income. Without Mr. X-'s support, Mrs. X- would have to apply for public assistance.

But the situation has even wider implications. Mrs. X- is extremely close to her elderly parents. Her father lives in a town just 150 miles away. Mrs. X- and her mother reside in the same town. Every day Mrs. X- visits with her mother and helps her with daily chores. If Mr. X- is removed from the United States, his wife would be faced with two equally untenable choices: relocate to Mexico and abandon her life and elderly parents in the United States or remain in the United States without her husband.

### *Bars to Relief Create a Permanently Undocumented, Impoverished Class*

"Mr. and Mrs. P-" have been married for more than 20 years. They are both in their early sixties. Mrs. P- is a U.S. citizen and Mr. P- has resided in the United States for the past 30 years. In 1981, Mr. P- was apprehended by the INS and ordered deported based on his undocumented status. After his deportation, Mr. P- reentered the United States illegally in order to be with his wife. Shortly thereafter, Mrs. P- filed an immigrant visa petition for her husband. Because Mr. P- was misinformed by an INS representative, he later abandoned his visa petition and filed for a green card under the legalization program.

However, the INS denied his legalization application. Mr. P- appealed the denial, but the appeal was dismissed in 1998.

Mr. P- is now barred from obtaining a green card on the basis of his marriage to a U.S. citizen. If he were to refile an application for permanent residence, the INS would reinstate his prior order of deportation. Mr. P- would immediately be taken into INS custody and his removal, which he could not challenge, would be effected shortly thereafter.

Mr. P- depends completely on Mrs. P- for support because without employment authorization he cannot work. If deported from the United States, he would be left with no financial support; his age and lack of ties to his native country would most likely prevent him from obtaining employment. Mrs. P-, in turn, would face a painful choice. She could give up her job, move away from her siblings and adult children in the United States, and relocate with Mr. P-. Or she could remain in the United States, apart from her husband, and work longer hours to meet the added expense of supporting her husband abroad. As a factory worker, she has little possibility of earning the necessary income to meet such expenses.



Photo Courtesy: Igor Naumovski, USCR

## **2. The Impact of Reinstatement of Removal on Families Fleeing Refugee-Like Conditions**

Reinstatement of removal and the permanent bars to admission operate inflexibly and without consideration for the reasons why an individual may have decided

to reenter the United States unlawfully. This makes for tragic results in cases where civil war, natural disasters, or other forms of social, political, or economic instability may have precipitated a person's decision to reenter the United States.

For example, Central American countries such as El Salvador, Guatemala, Nicaragua, and Honduras experienced massive out-flows due to civil wars in the 1980s. Many of their citizens came to the United States in search of political asylum. While most of their claims were rejected, and they were ordered to go back home, many remained in the United States or departed and later returned. The latter will bear the full brunt of reinstatement or removal.

In addition, the INS has taken the position that it can reinstate old deportation orders for immigrants in classes that Congress specifically intended to protect with recent, remedial legislation. By this interpretation, Guatemalans, Salvadorans, Eastern Europeans, and Haitians, who can legalize their status through the Nicaraguan Adjustment and Central American Relief Act (NACARA)<sup>134</sup> and the Haitian Refugee Immigration Fairness Act (HRIFA),<sup>135</sup> are nonetheless subject to reinstatement and immediate deportation if they ever effected an illegal reentry into the United States.

Most recently, the INS affirmed its position that reinstatement "may properly apply to some or all" of the class members in the American Baptist Churches (ABC) case.<sup>136</sup> However, the INS has agreed not to implement reinstatement in cases involving ABC class members, until this issue can be resolved.<sup>137</sup> The ABC case was brought to remedy bias in the adjudication of El Salvadoran and Guatemalan asylum cases in the 1980s. The resulting settlement afforded class members the right to new asylum interviews. Class members comprise 240,000 of the estimated 290,000 Central Americans eligible for NACARA relief.<sup>138</sup>

### *Escaping Peril at Home at Any Cost: an Irrevocable Decision*

At the height of the strife in Central America in 1986, "Mrs. C-" fled Honduras and came to the United States. She entered without documents, was arrested by the INS in Texas, and was released on bond pending a deportation hearing. After her release, Mrs. C- moved to New York, where she eventually met and married a U.S. citizen. In 1992, her husband filed an immigrant visa petition on her behalf. At that time, Mrs. C- learned that she had missed her deportation hearing in Texas in 1987 and had been ordered deported in her absence.

Mrs. C- requested and received special permission to reenter the United States. However, when she returned to Honduras for an immigrant visa interview at the U.S. consulate, her visa application was denied because she did not have proof that her husband could support her in the United States.

Desperate to be reunited with her family and fearing the still troubled political and social conditions in Honduras, Mrs. C- reentered the United States without permission in October 1995. In January 1996, she paid a penalty fee for entering the United States without inspection and filed for adjustment to permanent resident status. In 1998, while her adjustment of status application was pending, Mrs. C- went to the INS office to renew her work permit. During this visit, she was arrested, handcuffed, and placed in detention at the local INS jail. The INS retroactively applied the reinstatement of removal provisions to Mrs. C-'s prior order of deportation and moved to reinstate it after 13 years. Even though she has no criminal record, is married to a U.S. citizen, and has two U.S. citizen children, the law prohibits Mrs. C- from filing for any relief that would allow her to reside legally in the United States with her family.

### *No Protection from the Law: Father of United States Citizen Children Still Deportable Though Congress Intends Him to Stay*

"Mr. N-," a native of El Salvador, came to the United States in 1984. Like hundreds of thousands before him, he fled civil war in his country. Upon entry, the INS apprehended him and an immigration judge ordered him deported. He reentered without permission a short time later and has continuously resided in the United States ever since. In July 1991, he registered for temporary protected status, which was available to most Salvadorans. Mr. N- later filed for political asylum, but his claim, like most of those filed by Salvadoran and Guatemalan nationals, was denied by the U.S. government. He joined the ABC class action law suit.

Since registering as an ABC class member, Mr. N- has worked hard to support his family. He has been married to a lawful permanent resident since 1992. He and his wife have one U.S. citizen daughter who is eight years old. In addition, Mr. N- has two U.S. citizen step-children, ages eight and ten. For the past five years Mr. N- has worked as a wholesaler. His income sustains his wife and three children.

In late 1997, Congress passed NACARA. As one of the law's intended beneficiaries, Mr. N- applied to legalize his status. Under the law, he should have been eligible for a green card. Despite Congress's intent to help Mr. N-, the INS has taken the position that it can retroactively reinstate Mr. N-'s 15-year-old deportation order. Mr. N- did not realize this at the time he filed for NACARA relief. He and his family may face the prospect of his being removed and permanently barred from reentry.

## E. Victims of Domestic Violence

Domestic violence represents a curious topic for a report on family reunification because violence typically divides families. However, in the case of abused immigrants, our laws and policies do not offer enough protections to keep even the remnants of families whole and secure. Recent changes in our immigration laws allow abused immigrants to seek permanent resident status without being dependent on the cooperation of their U.S. citizen or lawful permanent resident abuser. While this represents an extremely positive development, gaping holes remain in the modest system of protections offered. It is precisely these weaknesses, many created by the 1996 Immigration Act, that devastate immigrant families.

### 1. Overview of the Problem

Violence against women is the most pervasive yet least recognized human rights abuse in the world, with “at least one woman in every three [having] been beaten, coerced into sex, or otherwise abused in her lifetime. Most often the abuser is a member of her own family.”<sup>139</sup> Studies estimate that two to four million women in the United States are battered every year, and between 3.3 and 10 million children witness violence in their homes.<sup>140</sup>

Although women from all ethnic, economic and social groups suffer domestic violence, battered immigrant women face perhaps the greatest obstacles in accessing help. Trapped in a violent relationship because they fear deportation, separation from children, and poverty, many abused immigrant women do not know that they can legalize their status without the cooperation of the abuser. Many believe they must rely on their abuser to help them obtain permanent residence. Batterers also commonly threaten their victims with removal, increasing their sense of isolation and helplessness. Additional obstacles to seeking help include language limitations, housing, the demands of single parenthood, isolation from a support network, retaliation from the abuser, cultural norms against reporting the abuser, and distrust of law enforcement.

Recognizing the severity of this problem, in 1994 Congress passed the Violence Against Women Act (VAWA).<sup>141</sup> This law applies to both abused men and women, but it is women who suffer the most from domestic violence. In formulating VAWA's immi-

gration provisions, Congress recognized how their lack of status trapped many immigrants in violent relationships: “A battered spouse may be deterred from taking action to protect himself or herself, such as filing for a civil protection order, filing criminal charges or calling the police because of the threat or fear of deportation.”<sup>142</sup>

VAWA offers two forms of relief to battered immigrants: “self-petitions” and cancellation of removal. The first allows a victim of abuse to self-petition for a family-based immigrant visa, without the cooperation of the abuser spouse or parent. The second allows the abused immigrant to request “cancellation” as a defense to removal in immigration court. Both avenues lead to lawful permanent residency. To receive either, the immigrant must demonstrate that she has been battered or suffered extreme cruelty by her U.S. citizen or lawful permanent resident spouse or parent. She must also show that she is a person of good moral character and that she or her child would suffer extreme hardship if removed from the United States. In the case of cancellation, she has to show three continuous years of presence in the United States.

VAWA represented a tremendous step forward in responding to the unique situation of a segment of at-risk immigrants. Furthermore, it has been relied on by tens of thousands of battered women and children. Its “cancellation” provisions took effect on September 13, 1994 and its “self-petition” provision on January 1, 1995. Adjudication of self-petitions did not begin until March 26, 1996.<sup>143</sup> As of December 1, 1999, the number of self-petitions filed was 9,614, with 5,221 approved. The INS Service Center in Vermont, the processing unit for self-petitions, estimates that most of the cases denied were those of people applying without the assistance of a lawyer or representative.

### 2. The Impact of Three- and Ten-Year Bars on Victims of Domestic Violence

The 1996 Immigration Act undermined the modest system of protection and self-help that VAWA put in place. One glaring example involves the impact of the three- and ten-year bars for unlawful presence. As previously noted, under the 1996 Immigration Act, any person “unlawfully present” for 180 days after April 1, 1997 who leaves the United States will be barred from reentry for three years. Those unlawfully present for more than one year may not legally reenter for ten years.

While there is a general waiver to the three- and ten-year bars to admission,<sup>144</sup> it would be practically impossible for a battered woman to qualify. Ironically, the waiver may be granted only if there is a showing of extreme hardship to the U.S. citizen or lawful permanent resident spouse or parent of the battered immigrant. An abused woman (or child) could hardly be expected to show that her absence would cause extreme hardship for her abuser.

In addition to the general waiver, there are two narrow waivers for abused immigrants. In the case of a battered woman who is unlawfully present, she must have entered legally on a non-immigrant visa, as a visitor or student, and somehow demonstrate a “substantial connection” between her unlawful presence and the battery.<sup>145</sup> This exception only applies to persons who originally entered legally; it does not help persons who entered illegally. Furthermore, as of this writing, no guidelines have been developed to explain the meaning of “substantial connection” or even whether the woman must leave the country to obtain the waiver. Of course, an undocumented abused woman who leaves the country would place herself at risk of being barred from returning to the United States and to any family she has here.

A waiver also exists for abused persons who illegally entered, provided they can show a substantial connection between the illegal entry and the battery.<sup>146</sup> As with the waiver for undocumented persons who entered legally, the precise meaning of this waiver is unclear. However, it would not apply to a person who marries her husband after her illegal entry. In addition, a woman who entered illegally does not qualify for the waiver of the three- and ten-year bars for unlawful presence, which requires a legal entry.

A wait of three to ten years to reenter the United States is a particularly devastating blow for abused women. It deprives them of the protection of the U.S. judicial system, including restraining orders and enforcement of custody decrees. It also places them at risk of being followed by the abuser. Depending on cultural norms in her home country, a victim of domestic violence could be ostracized or punished for bringing “disgrace” to her family. In short, the application of these bars to victims of domestic violence undermines the purposes of VAWA: to protect victims of domestic abuse and to send a message that such abuse is wholly unacceptable.

## *Abused Woman and Her Oldest Daughter Face Separation from Younger Child Due to Bars for Unlawful Presence*

“Mr. and Mrs. R-” have been married since 1975, but currently are separated. Mr. R- is a U.S. citizen and Mrs. R- is undocumented. They have seven children. Since the beginning of their marriage, Mr. R- has abused Mrs. R- and their children, especially his two eldest daughters. During one of Mrs. R-'s pregnancies, he beat her so badly that she needed treatment at the emergency room. On two separate occasions, he attacked her with a knife, cutting her face and slashing her leg. Another time, he threw her on the floor and stomped on her head. Mr. R- also allowed his father and brother to hit Mrs. R-.

Although Mr. and Mrs. R- have resided in the United States since 1980, all of their children, except the youngest, were born in Mexico. Near the end of each pregnancy, Mr. R- forced Mrs. R- to return to Mexico to give birth. He used his wife's and children's undocumented status to ensure that they would not report his abusive behavior to the police. However, the daughters ultimately broke down at school and informed their principal of the problem. At this point, the state's family and child services agency became involved.

Mrs. R- filed a self-petition after the cut-off date for in-country adjustment to permanent resident status, which the INS approved. Because she and her children are the immediate relatives of a U.S. citizen, they are immediately eligible to apply for permanent resident status. However, Mrs. R- and her children entered the United States without inspection. All have accumulated more than one year of unlawful presence in the United States. Under the law, Mrs. R- and her oldest daughter must leave the country in order to complete the permanent residence process. Children under the age of 18 are exempted from the three- and ten-year bars. All of Mrs. R-'s children, except her oldest daughter, are under the age of 18. If Mrs. R- and her oldest daughter leave the United States, they will face a ten-year bar to admission. Because Mrs. R- and her daughter did not enter legally, they do not qualify for a waiver to the bar for unlawful presence. Thus, they will be forced to spend years outside the country away from their family. Their only other option would be to remain undocumented in the United States.

### 3. Removal of the Abuser Damages the Victim, by Eliminating the Basis of the Application to Legalize Status

Crimes of domestic violence and child abuse can lead to the conviction and ultimate removal from the United States of abusive permanent residents. Ironically, while the removal of the abuser may be a positive event from one perspective, it often presents further problems for the victim. If the abuser is deported before approval of the VAWA self-petition, the victim loses the basis for her family-based visa. At that point, the battered woman herself may be subject to deportation.

In addition, abused women often commit “crimes” in the context of the abusive situation that make them removable. For example, they may themselves be charged with assault when they try to defend themselves. Because of the language barrier, the abuser may be able to convince the police that the woman instigated the violence. In other instances, they may be co-charged with child abuse, as the parent of a child who suffered abuse. Often criminal attorneys representing abused immigrant women do not know the immigration consequences of having the woman plead guilty to the crime. Even if she is not convicted, charges of domestic violence or child abuse could preclude a finding of good moral character, one of the requirements for VAWA self-petitions and cancellation of removal.

#### *Victim of Domestic Violence Loses Chance to Legalize Status When Her Husband is Deported for His Abusive Behavior*

“Mr. G-,” a lawful permanent resident, and Mrs. G-, an undocumented immigrant, were married in 1987. In 1989, they had their first U.S. citizen child. Mrs. G- brought two children of her own to the marriage. In subsequent years, they had two additional U.S. citizen children. During the third year of their marriage, Mr. G- began to abuse Mrs. G-, and continued that behavior to the end of their marriage. Although Mr. G- filed an immigrant visa petition for Mrs. G- and his step-children in 1994, he continued to abuse his spouse and 13-year-old step-daughter. Ultimately, Mr. G- raped the child.

Mr. G- was criminally prosecuted and convicted of aggravated sexual assault against a child. In

November 1996, Mr. G- was removed from the United States due to his conviction. The termination of Mr. G-'s legal immigration status removed the basis for Mrs. G-'s family-based self-petition. An approved self-petition would have given Mrs. G- and her undocumented children the opportunity to gain legal status in the United States. Mrs. G- is the sole provider for her five children, three of whom are U.S. citizens. Her continued undocumented status hinders her ability to obtain a secure job and to provide for her family. While struggling to make ends meet, she lives in fear of apprehension by the INS and of separation from her children.

### 4. Victims of Abuse Cannot Waive Past Fraud and Misrepresentations

Under the 1996 Immigration Act, persons who used fraud or willfully misrepresented a material fact to obtain admission into the United States are inadmissible. There is a waiver for misrepresentation if the immigrant can show extreme hardship to a U.S. citizen or permanent resident spouse. As a practical matter, however, such a showing is not possible for a victim of domestic violence.

#### *Abused Wife of U.S. Citizen Faces Separation from Minor Daughter Due to Illegal Entry Ten Years Before*

“Mrs. L-” entered the United States in 1990 from the Philippines with a false passport. In 1995, she met a U.S. citizen, whom she married the following year. Together they have one U.S. citizen child. Shortly after the marriage, Mr. L- became abusive. He would punch walls, kick in the bedroom door, and threaten to kill Mrs. L-. One time, he smashed all the plates on the dinner table. Mr. L- was often in a rage, pulling Mrs. L-'s hair, pinning her against the wall, grabbing her face. When she was pregnant, he pushed her against the stairs so severely that she needed to seek emergency medical assistance. After that incident, she fled to a shelter for battered women, and obtained a permanent order of protection against her husband. Mrs. L- filed a self-petition under VAWA, which the INS approved.

Because of her misrepresentation in using a false passport to enter the United States ten years before, Mrs. L- will be denied permanent residence by the INS. She cannot bear the thought of separation from her daughter. To compound matters, Mr. L- has threatened to file a custody suit against Mrs. L- if she takes their U.S.

citizen daughter to the Philippines. Currently he has visitation rights, which will be violated if Mrs. L- leaves the United States with her daughter.

Mrs. L- is not eligible for a waiver of her misrepresentation because she cannot show that her departure would cause hardship to her abusive U.S. citizen husband. The law does not allow for a waiver based on the extreme hardship her departure would cause to her U.S. citizen child.

## 5. Victims of Domestic Violence in Common Law Marriages Often Do Not Qualify for VAWA Relief

Abused women in common law marriages, which are extremely prevalent in immigrant communities, face an uphill battle in attempting to legalize their immigration status. Only twelve states recognize a common law marriage as a valid marriage.<sup>147</sup> For purposes of VAWA, the INS will not recognize a common law marriage if the marriage is not recognized in the state of residence. The lack of VAWA protection to victims of violence in common law marriages may lead to the separation of abused spouses from their U.S. citizen children, and the marginalization of those families that remain together.

### *Woman Abused by Permanent Resident Spouse in Common Law Marriage Faces Possible Separation from Three of Her Children*

"Mr. and Mrs. T-" began living together as husband and wife in Mexico in 1987. In total, they lived together for nine years. Mr. T- is a lawful permanent resident, while Mrs. T- is undocumented. Together, Mr. and Mrs. T- have three children. The youngest (age six) is a U.S. citizen; the other two (ages eight and ten) are undocumented. In addition, Mrs. T- has three children from a prior relationship, ages 14, 17 and 19, who are all undocumented. In 1994, Mrs. T- and her children came to the United States with Mr. T-. In 1995, their youngest child was born in the United States.

Mr. T- has sexually abused Mrs. T- and all of her children. This abuse intensified when the family entered the United States. In 1996, Mrs. T- discovered that Mr. T- had been sexually abusing her daughter over the previous year. At that point, Mrs. T- separated from him. Currently the family is receiving help from various family social service programs.

Mr. and Mrs. T-'s undocumented children are eligible to file self-petitions, as the abused children of a lawful permanent resident. However, because Mrs. T- and her family reside in a state that does not recognize common law marriages, neither Mrs. T- or her children from her prior relationship are eligible to self-petition under VAWA. Since Mr. and Mrs. T-'s common law marriage is not recognized by their state of residence, Mrs. T-'s three children do not qualify as Mr. T-'s step-children under the law. Ultimately, Mrs. T- will have three documented and three undocumented children living in the United States. Mrs. T-'s undocumented status will compound her struggle to support her "mixed status" family and may ultimately lead to her removal.

## 6. Extreme Hardship Requirement Difficult to Meet for Some Victims of Abuse

To qualify for permanent residence through the self-petition process, a VAWA applicant must demonstrate, among other requirements, that her removal will cause extreme hardship to her children. If her spouse had followed the normal route and filed a petition for her, she would not have the burden of proving extreme hardship. Thus, she bears a greater burden precisely because of her victimization. Many unrepresented battered immigrants find it almost impossible to prove extreme hardship. In fact, even those with representation often cannot meet this burden.

### *Victim of Domestic Violence Detained for Two and One-Half Years Away from Daughter*

For five years, Dora Garcia suffered brutal beatings at the hands of her husband. He repeatedly banged her head against the wall, bit her, and beat her, breaking several of her teeth. When she finally managed to leave him, he reported her undocumented status to the INS. The agency took her into custody, where she remained detained for two and a half years, separated from her young U.S. citizen daughter. Like many battered women, she had been arrested for crimes that resulted from her efforts to protect herself. Despite evidence of her eligibility for VAWA cancellation of removal, the immigration judge denied her application on the grounds that her arrests precluded her from demonstrating good moral character and that she had not shown that extreme hardship would

result if she were removed. She appealed her case to the Board of Immigration Appeals (BIA), which affirmed the decision of the Immigration Judge.

However, in February 2000, the BIA reopened Dora's deportation case in order to hear new evidence showing the effects the abuse had on her young daughter. One reason she had not previously presented evidence about the hardship to her daughter was that she learned very late in the case that her daughter had been sexually abused by her husband. Her detention, which included a year in which she did not see her daughter at all, prevented her from learning about the assault. Finally, in March 2000, Dora's bond was reduced from \$5,000 to \$2,500 and she was released. Her daughter was 11 years old at the time. Dora is currently awaiting her next immigration court hearing.<sup>148</sup>

## 7. Other Problems Faced by VAWA Applicants

VAWA leaves several additional gaps in our immigration laws' protections for victims of violence. First, a woman must be married at the time of filing the VAWA self-petition. Many abusers, knowing that their spouses will not be eligible for VAWA if not married, obtain a divorce before the VAWA petition is filed. In contrast, women applying for VAWA cancellation of removal do not have to be married at the

time of filing. Second, VAWA cancellation of removal applicants must be in the United States continuously for three years prior to applying. The time applied to the three-year continuous presence ends when the INS initiates or issues a notice to appear for removal proceedings. Third, persons with approved self-petitions are eligible for public benefits. However, those who use benefits may be denied permanent residency on "public charge" grounds. Children of battered immigrant women who were in the United States prior to August 22, 1996 are eligible for Food Stamps, but the abused woman is not. Fourth, some victims of domestic violence, who turn to the police for help, are questioned about their immigration status. This makes them fearful of seeking protection. Fifth, many victims of violence continue to have no avenue for becoming permanent residents. This includes persons who have suffered from forced prostitution and human trafficking.



Photo Courtesy: INS

## F. Immigrant Families with Members Who Have Criminal Convictions

The 1996 Immigration Act culminated a decade of legislation that expanded the crimes for which immigrants could be removed and severely restricted their ability to fight removal based on their family and other equitable ties in the United States.

Under current law, long-term permanent residents with U.S. citizen spouses and children, steady employment records, strong community ties, and the absence of any connections (even linguistic) to their countries of birth, can be deported for relatively minor crimes that they committed years before. The operative term for the principle category of crimes that trigger removal — “aggravated felonies” — encompasses violent crimes, but also less serious offenses such as money laundering, tax evasion, fraud, shop-lifting, receipt of stolen property, obstruction of justice, perjury, document fraud, smuggling family members into the country, gambling offenses, and illegal reentry following removal for an “aggravated felony.”<sup>149</sup> As discussed below, the criminalization of our immigration laws means that civil immigration violations increasingly form the basis for removal on criminal grounds.

Beyond expanding the criminal offenses that can lead to removal, the 1996 Immigration Act restricted the ability of immigrants facing removal to remain in the United States based on their family ties here. Lawful permanent residents who have been convicted of “aggravated felonies” have no grounds to contest their removal — regardless of the length of their time

in the United States, their family ties, the time elapsed since their conviction, their rehabilitation, the triviality or seriousness of their crime, or the suffering their removal will work on their U.S. citizen or lawful permanent resident family members.<sup>150</sup>

### 1. The Removal of “Criminal Aliens” Away from Their Families

Our immigration laws and enforcement priorities target “criminal aliens” and, in particular, “aggravated felons.” These terms connote undocumented persons who have committed substantial felonious acts. Surprisingly, however, they also cover long-term lawful permanent residents, including those brought to the United States as refugees, who have relatively minor and old criminal records.

The term “aggravated felony,” which has no parallel in criminal law, made its appearance in our immigration laws in 1988.<sup>151</sup> At that time, it included offenses such as murder and trafficking in controlled substances and weapons. Congress expanded the definition in 1990 to include crimes of violence for which the term of imprisonment imposed was at least five years.<sup>152</sup> In 1994, it added a laundry list of new “aggravated felonies,” including money laundering, prostitution, trafficking in fraudulent documents, theft offenses where the term of incarceration imposed was five years, and fraud charges.<sup>153</sup> The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>154</sup> expanded it further to include: gambling offenses; alien smuggling where the term of imprisonment is at least five years; document fraud where the term of imprisonment is at least 18 months; jumping bail where the underlying offense is punishable by a term of five years or more; failure to appear for trial where the underlying offense is punishable by a term of two or more years; reentry by a deported alien; and obstruction of justice, perjury or subornation of perjury if a sentence of five or more years may be imposed. The 1996 Immigration Act added, among other crimes, felony RICO and gambling offenses, and theft offenses for which the term of imprisonment is at least one year.<sup>155</sup> The 1996 Immigration Act also made human smuggling offenses “aggravated felonies,” with the exception of a first offense committed to aid a spouse, child or parent.<sup>156</sup>

Making matters worse, the new expanded definition of “aggravated felony” applies retroactively to cover crimes committed before the change in the law.<sup>157</sup> Also, the immigrant does not even need to be

“convicted” under state law. The INS refuses to recognize, for example, dismissed convictions or dispositions that state courts do not consider to be convictions.

### *Fifty-Year Permanent Resident Removed Based on 20-Year-Old Drug Possession Charge*

“Mr. G-,” a lawful permanent resident for 50 years, retired in 1978. He was watching television when his grandson came into the house, followed by police officers. The police found narcotics in the boy’s room and arrested the boy and grandfather. Mr. G- languished in jail for 90 days before pleading guilty, on the advice of counsel, to a drug possession charge. He was sentenced to probation. Twenty years later, the INS deported the 81-year-old man as an aggravated felon.<sup>158</sup>

### *Thirty-Six-Year Permanent Resident Wife of U.S. Citizen and Mother of U.S. Citizen Disabled Son, Faces Removal for 12-Year-Old Shoplifting Conviction*

“Mrs. A-” emigrated as a lawful permanent resident to the United States from Spain in 1963, where she met and married a U.S. citizen serviceman. She has one U.S. citizen son who is 34 years of age. Her son is mentally retarded and lives in a group home with her financial assistance. Mrs. A- has no family in Spain. Her only brother and sister live in France. She supports herself by working as a home attendant for elderly persons.

Mrs. A- has been arrested twice since arrival in the United States. Both arrests took place in 1988 and involved attempts to shoplift perfume. After the first arrest, Mrs. A- was convicted of theft of more than \$100 but less than \$250, and sentenced to six months imprisonment. The second arrest for stealing perfume was enhanced to a burglary offense. Mrs. A- was sentenced to four years imprisonment, but was paroled after serving only seven and a half months. She completed her parole in 1992. Apart from these two incidents, Mrs. A- has no other convictions.

During her incarceration in 1988, the INS charged Mrs. A- as deportable for having been convicted of two crimes involving moral turpitude. However, the INS failed to serve the charging

document on the immigration court, which would have initiated deportation proceedings. As a result, Mrs. A- was never scheduled for a deportation hearing.

In 1996, Mrs. A- went to an INS district office to renew her green card. At that point, the INS realized that Mrs. A-’s charging document had never been served on the immigration court. Shortly thereafter, Mrs. A- was scheduled for a deportation hearing. At the hearing, she applied for a waiver from removal. However, the 1996 Immigration Act, which eliminated this waiver, had become law after Mrs. A-’s deportation proceedings had begun. As a result, she was charged as an aggravated felon and ordered deported.

Mrs. A-’s immigration attorney filed an appeal challenging the retroactive application of the new law, arguing that Mrs. A- was eligible for voluntary departure. The BIA sent the case back to immigration court, but only for a hearing on Mrs. A-’s eligibility for voluntary departure.

Mrs. A- has not been detained. She continues to work as a home attendant. If deported, she will be forced to take her son with her, as she will no longer be able to support him in his group home in the United States. Her age, lack of education, dependent son, and absence of family support will impede her ability to start over again in a country she left 36 years ago.

### *Ethiopian Refugee, Who Entered United States as a Child, Narrowly Averts Removal to Country to Which He Has No Ties*

At the age of ten, “Mr. Z-,” an Ethiopian national, came to the United States as a refugee with his father. He is currently a 25-year-old lawful permanent resident. His father is a citizen of the United States. During his sophomore year of high school, Mr. Z- was diagnosed with schizophrenia. At the time, his school attendance dropped and he was treated in different psychiatric hospitals. Mr. Z- continues to struggle with schizophrenia.

In early 1996, Mr. Z- was arrested on two separate occasions. In February 1996, Mr. Z- was in a store wearing a pair of eyeglasses that he had not yet purchased. He was arrested and charged with petty theft. He received a one-year jail sentence, with all but 55 days suspended.

Under current immigration law, this crime is an aggravated felony.

In April 1996, while homeless, Mr. Z- was arrested for loitering and trespassing. Although in the care of his mother and father, Mr. Z- often wandered out at night, sleeping in hallways, elevators, and stairwells of buildings. During an arrest for loitering on one such occasion, Mr. Z- pushed a police officer. He was charged and convicted of battery, and ultimately sentenced to one year in prison with all but five days of this sentence suspended.

As a result of these convictions, the INS ordered Mr. Z- to appear for his removal proceedings. Although both of his sentences had been reduced to less than one year, the INS maintained that the sentence reductions had no immigration effect. Subsequently, the INS relented and agreed to terminate proceedings against him in light of his mental health and a psychiatrist's opinion that he was incompetent to proceed in deportation proceedings. This result does not diminish the fact that, under the law, Mr. Z- could well have been removed to a country to which he had no connection.

### *Lawful Permanent Resident Faces Removal Based on Conviction, Since Dismissed Under State Law, for Possession of Marijuana*

Joseph Okeke came to the United States from Nigeria when he was two years old. He played football for his high school team and attended the University of Texas. He was convicted of possession of cocaine and served six months in jail, and received a ten-year probation. Under Texas law, his conviction will be dismissed and will not appear on a criminal record if he follows the terms of his probation. However, the INS still considers it a conviction, and has put him in deportation proceedings. If removed, he will return to a country he has not seen for 20 years and which he does not remember.<sup>159</sup>

## **2. The Loss of Relief from Removal Based on Family and Other Equitable Ties in the United States**

Under pre-1996 law, immigrants facing removal due to a criminal conviction could seek a waiver, known as a section "212(c) waiver," based on their family and

other equitable ties in the United States. To qualify, a lawful permanent resident needed to have lived in the United States as a permanent resident for seven years. The waivers were not automatic, but did allow an immigration judge to weigh the potential human costs of deportation. Before 1996, about half of the people who submitted requests for these waivers actually received them.<sup>160</sup>

The 1996 Immigration Act repealed this waiver, replacing it with a far more limited waiver known as "cancellation of removal." To qualify for cancellation as a permanent resident, the immigrant must have been lawfully admitted for permanent residence for five years, resided continuously in the United States for at least seven years, and not been convicted of an "aggravated felony."<sup>161</sup> The latter requirement effectively excludes most lawful permanent residents with criminal convictions. In addition, continuous residence ends on the date the applicant committed the offense. Finally, a person previously granted suspension of deportation or cancellation of removal cannot apply for the relief.<sup>162</sup>

Persons who have not obtained lawful permanent residence and commit a crime face even greater difficulty in attempting to avoid removal. Under prior law, immigration judges could grant an equitable waiver known as "suspension of deportation" to such persons, provided the offense occurred more than ten years before, the person had been physically present in the United States for ten years, and had demonstrated good moral character for ten years. The applicant also needed to demonstrate extreme hardship to himself, or to a U.S. citizen or lawful permanent resident spouse, parent, or child.<sup>163</sup> The 1996 Immigration Act also repealed this waiver, replacing it with "cancellation of removal" for non-permanent residents.<sup>164</sup> However, this waiver is not available to anyone convicted of an exhaustive list of crimes.<sup>165</sup> In addition, immigration judges can no longer consider the hardship that removal would cause the non-citizen.

Under the 1996 Immigration Act, only 4,000 people per year may be granted "suspension of deportation" or "cancellation of removal."<sup>166</sup> In FY 1996, there were 11,613 applications for suspension of deportation.<sup>167</sup> In FY 1997, by February 13, more than 3,900 applications had been granted, prompting the BIA and Executive Office for Immigration Review (EOIR) to issue directives to immigration judges to refrain from granting any further applications for the remainder of the year.<sup>168</sup> Although a further 4,000 grants were made available for FY 1998, the cap

remains in effect. The EOIR implemented a procedure whereby grants will be made on a first-come, first-served basis, but that will only leave the INS with another backlog.<sup>169</sup> The cap for FY 1999 was reached on May 3, 1999.<sup>170</sup> People whose cases are heard after the cap has been reached remain technically in proceedings, or in legal limbo, until a visa becomes available.

Since there is no relief available to most people with criminal convictions, the only chance to remain with family in the United States is to persuade the INS to use its prosecutorial discretion not to initiate removal proceedings which rarely occurs. However, even if successful, this will not prevent the INS from initiating proceedings in the future. Distress at the number of long-time residents being deported prompted 27 members of Congress to write to the Attorney General urging her not to “prosecute” or initiate removal proceedings in these cases. In response, the Department of Justice acknowledged that “the exercise of prosecutorial discretion by the INS [is] the only means for averting the extreme hardship associated with certain deportation cases,” and argued that it remains an inadequate tool to alleviate the consequences of the 1996 Immigration Act.<sup>171</sup>

### *Long-Term Permanent Resident with U.S. Citizen Spouse and Three U.S. Citizen Children Faces Deportation Due to 12-Year-Old Conviction for Possession of Cocaine for Personal Use, a Crime for Which He Received No Time*

“Mr. M-” is a native of Jamaica. He has been a lawful permanent resident since 1986, when he emigrated to the United States to live with his U.S. citizen father. He is married to a United States citizen. They have three U.S. citizen children, ages six months, one year, and five years. He also has a 12-year-old U.S. citizen step-son. His only brother and sister are lawful permanent residents of the United States.

In 1988 he was convicted of possession of cocaine for personal use. He pled guilty and received a two-year suspended sentence. He received two years of probation, which he successfully completed. He never served a day in jail.

In 1994, Mr. M- was stopped for a traffic violation. A background check disclosed his prior criminal conviction, and the INS placed him in

deportation proceedings. The case has been procedurally complicated. However, most recently, an immigration judge found that the “212(c) waiver” was no longer available to Mr. M- because the decision of a prior immigration judge granting him this relief had not been finalized at the time the new law went into effect. The judge ordered him deported to Jamaica. In April 1999, Mr. M- appealed the decision.

Mr. M- is not detained. He currently works for General Electric on a full-time basis. Although his wife works as a computer programmer, his income is vital to maintaining their family. He is active in his church and is a member of the Hebrew Memorial Men’s Fellowship. He has no other arrests. He has no immediate family remaining in Jamaica. Neither his wife nor his children have ever been to Jamaica. If he is deported, his family will probably accompany him there.

### *Twenty-Year Permanent Resident with Permanent Resident Wife and Three U.S. Citizen Children Faces Removal Based on 18-Year-Old Conviction for Sale of Marijuana*

“Mr. P-” has been a permanent resident in the United States since the age of 17. He and his sister legally immigrated to the United States from Jamaica to join their mother in 1978. He is now 37 years old, and married to a permanent resident. Together, he and his spouse have three U.S. citizen children, ages seven, nine, and 14. His wife has worked for the same company for the past ten years. Her job frequently requires travel and long hours. She depends on Mr. P- to take care of the children and to ensure all of their needs are met on a daily basis. Prior to meeting his spouse, at the age of 21, Mr. P- was arrested and charged with possession of marijuana.

Mr. P- was never incarcerated, but sentenced to five years probation. Since completing his probation, Mr. P- had earned his GED and an Associates Degree as a Lawyer’s Assistant. Two months after graduation, he began working for an aviation company. He worked for the same company for seven years, until he was laid off due to company downsizing.

In 1982, Mr. P-’s probation officer informed the INS of his criminal conviction. Mr. P- led a productive life, and was able to make several brief trips abroad without incident. However, in

March 1997, upon his reentry to the United States, Mr. P-'s criminal record surfaced. As a result of his 1982 controlled substance conviction, the INS charged him as inadmissible. There is no waiver available to Mr. P-.

### 3. Specific Categories of Immigrants Disadvantaged by “Criminal” Conviction Provisions of the 1996 Immigration Act

The “criminal” provisions of the 1996 Immigration Act work the greatest hardship on persons with the strongest equitable ties to the United States. These include persons with no connection to their countries of birth, refugees, people with severe health problems, those adopted as orphans by American families, and military veterans. They also include, by extension, the families of these people. This section discusses some of the categories of persons most impacted by the criminal provisions of the 1996 Immigration Act.

First, the INS regularly removes persons to countries they have not even visited for many years. Gerardo Anthony Mosquera, a 38-year-old man deported to Colombia, had not returned since he left as a child. His Spanish is rusty, and he feels like a stranger in Cali, his mother’s home town. He does not know how to begin to look for a job. He was convicted in 1989 of selling a \$10 bag of marijuana, and received 90 days in jail and three years probation. The INS picked him up when he was subsequently jailed for failing to report to his probation officer.<sup>172</sup>

Romano Denaro arrived in the United States from Italy with his family in 1968 at age 15. He received a college degree, became an accountant, married and had three U.S. citizen children. He lost his job as controller at a New York media company in 1990, and took another job at half the salary. In 1994, he started a delivery service. He was convicted of larceny for submitting false invoices, and sentenced to one to three years. He has not been to Italy for 31 years, and says it would destroy him to return there. “Who am I going to turn to in Italy? I have nobody there.”<sup>173</sup>

Second, the law makes no exceptions for persons brought to the United States as refugees. “Mr. Y-” is an Eritrean who was four years old when he escaped with his mother and came to the United States as a refugee. His entire family, including his infant, live in the United States, and it is the only country he has known. He faces deportation to Eritrea for a drug conviction.<sup>174</sup>

Third, removal to a country without adequate health

care can be a death sentence for those with severe health problems. Juan Carlos Isabel is a 40-year-old father of five children. He served six months for a robbery several years ago. He now faces removal to the Dominican Republic. He is HIV-positive, and access to drugs in the Dominican Republic is very limited. Not only will deportation cost him his family, it may well cost him his life. “If it wasn’t for my critical illness, I would have gone back to my country. . . . I would not last there. I have to support my family. Everybody is here, my family’s here, my brother, my mother. We’re Americans.”<sup>175</sup>

Fourth, even orphans adopted long ago by American families face removal. Mary Anne Gehris was adopted from Germany when she was two years old and spent her life in Georgia. She is now married and the mother of two U.S. citizen children, including a 14-year-old with cerebral palsy. Eleven years ago, she was convicted of misdemeanor assault for pulling another woman’s hair and received a year’s probation. In 1999, she applied for U.S. citizenship. She answered honestly when asked if she had ever been convicted of a crime, and the INS put her in deportation proceedings.<sup>176</sup> Fortunately, in March 2000, Mrs. Gehris was granted a full pardon by the Georgia State Board of Pardons.<sup>177</sup>

John Gual III was not as lucky. He was born in Thailand and spent his first year in an orphanage. He too was adopted when he was two years old by an American family. At age 17, he applied for a U.S. citizen passport so he could travel overseas with his family. The passport application was denied because John was not a U.S. citizen. At this time his mother filed a citizenship application for him. However, the INS failed to process the application prior to his 18th birthday. As a result, he lost his opportunity to naturalize through adoption. John does not speak Thai. As a teenager, he was convicted of writing bad checks and stealing a car. He served 20 months in prison. At age 25, the INS deported him to Thailand. He will not be allowed to return to the United States for 20 years. His mother went with him to help him start his new life. The social workers who had put him on a plane to the United States as a child met him upon his return to Thailand.<sup>178</sup>

Joao Hebert, a 22-year-old born in Brazil, was adopted by an American couple at age eight. Living with his family in Ohio he learned English quickly and forgot how to speak Portuguese. After graduating from high school, he sold marijuana to an undercover police officer and was sentenced to community service and probation. He served no jail time until the INS took him into detention, where his mother visits him

twice a week. He has been ordered deported to Brazil, where he knows nobody. However, Brazil refused to grant him a passport, saying that the link with Brazil had been cut by the international adoption. According to the Brazilian government, his adoptive parents and country are responsible for Mr. Hebert.<sup>179</sup> As a result, Mr. Hebert may face indefinite detention.

Fifth, children left behind in the United States can be devastated by the sudden loss of a parent through deportation. Gerardo Mosquera Jr., a 17-year-old high school student, took his own life when his father was deported. His father had been a lawful permanent resident of the United States for 29 years when he was deported in December 1997 for an eight-year-old conviction for selling a \$10 bag of marijuana to a undercover police officer. A few days before Thanksgiving in 1997, the INS came to the Mosquera family home before dawn in order to arrest and deport Mr. Mosquera. Both parents had left for work, so the INS officers woke the children, accusing them of hiding their father. The INS allowed Mr. Mosquera to spend a final Thanksgiving with his family, but ordered him to report for deportation on December 3, which he did. Mr. Mosquera's removal shattered the lives of his U.S. citizen wife and children. After Gerardo shot himself, the family did not have enough to pay for funeral expenses. Officials at the U.S. Embassy in Colombia denied Mr. Mosquera permission to attend his son's funeral in Los Angeles.<sup>180</sup>

Olufolake Olalye, a mother of two young children, has supported herself and her family since she moved to the United States in 1984. She became a lawful permanent resident in 1990. In 1993 she was convicted of shop-lifting baby clothes, fined, and given a twelve-month suspended sentence. Even though she never actually spent a day in jail, the fact that she received a one-year sentence made her an "aggravated felon," and thus ineligible for relief from removal. When she is deported, she will face the choice of abandoning her U.S. citizen children or taking them with her to Nigeria.<sup>181</sup>

Catherine Caza came to the United States in 1960 at the age of three. In 1980, she was taking amphetamines as prescribed by her doctor. Her boyfriend, who turned out to be an undercover police officer, persuaded her to sell him some of the pills. She did so, and was convicted and sentenced to probation. Ms. Caza has been pardoned by the Governor of Florida, but the INS does not recognize the pardon. In 1982, the INS ordered her to appear for a deportation hearing, but did not present the order to the immigration court to initiate the proceedings for 15 years.

By the time they did, the law had changed, and Ms. Caza was no longer eligible for a waiver of deportation. Both her life and her seven-year-old daughter's are on hold, while her appeal is pending.<sup>182</sup>

A young Colombian mother has decided that if she is removed from the United States, her eleven-year-old U.S. citizen son will remain. "It is hard to justify taking my son away from his home and denying him the opportunities available to him in this country," she wrote to CLINIC. "It is breaking my young son's heart to consider his mother will be taken from him, and he is too young to understand how difficult it will be to live in Colombia without family or money. . . . I want my son to be able to stay here and fulfill his dreams, but I also want to be able to stay with him and help him become the fine young man I know he will be. My son is the most important thing in my life."<sup>183</sup>

Sixth, even persons who have risked their lives to serve in the armed forces of the United States are not immune from the reaches of the law. Gabriel Delgadillo was born in Mexico to a family of migrant farmworkers who worked the fields of California. He was drafted in 1967 and served in a combat support unit during the Vietnam war. He earned three service medals and worked in a steel foundry after the war. In 1988, he let his friends use his car to commit a burglary. He pleaded guilty to burglary and was sentenced to 14 months in prison. The INS discovered his conviction when he applied for disability benefits from the Veterans Administration in 1999. He was deported in April 1999.<sup>184</sup>

Mr. Rafael Ramirez left the Dominican Republic when he was seven years old and enlisted in the U.S. Army in 1984. He was honorably discharged in 1990. Nine months later, he was convicted of possession of marijuana and sentenced to five years probation. He is the father of four U.S. citizen children, a college graduate, the superintendent of an apartment building, and the owner of a small contracting business. The INS initiated removal proceedings against Mr. Ramirez as a result of his drug charge, but in April 1999, dropped the case against him, partially as a result of embarrassing media attention. Nevertheless, because of his criminal record, Mr. Ramirez could be deported at any time.<sup>185</sup>

Ralph Hesselbach left Germany 38 years ago when he was eleven years old. His father was an American G.I. during World War II. He enlisted in the U.S. army when he was 17 and was sent to Vietnam. After

eight months on the front lines, he suffered a severe injury. He was honorably discharged and sent home. Due to the injuries he sustained in Vietnam, Mr. Hesselbach underwent months of rehabilitation which included the use of a morphine drip. When he was finally released from the hospital, he turned to heroin to ease the physical and mental pain. In 1994, he was convicted of possession of heroin and sentenced to one year. This conviction led the INS to initiate deportation proceedings against him. An immigration judge ordered Mr. Hesselbach deported, but he has filed an appeal before the BIA. He knows no one in Germany and speaks only a couple of words of German. "They might as well drop me off in any country in the world, really," he has said.<sup>186</sup>

#### 4. The Criminalization of Immigration Violations

The 1996 Immigration Act continued a trend to criminalize our nation's immigration laws. It transformed civil violations into crimes, and increased the criminal penalties for immigration violations already considered crimes. Unlike most crimes, immigration "crimes" do not typically spring from bad motives; many stem from undocumented status itself. In other cases, family reunification drives people to commit acts that the immigration laws consider criminal. For example, Arturo Olvera Barrera illegally reentered to see his son, but now faces a criminal sentence of 9 to 15 months, and 20 years if he is caught again.<sup>187</sup> Tragically, Mr. Barrera's son died in an auto crash while his father awaited sentencing. With the circularity characteristic of the 1996 Immigration Act, immigration offenses increasingly serve as the basis for "criminal" removals, accounting for 13 percent of all "criminal alien" removals in 1999.<sup>188</sup> The prosecution of immigration "crimes" and subsequent removal of offenders particularly damage immigrant families.

Immigration "crimes" created by the 1996 Immigration Act include making a false claim to U.S. citizenship for the purposes of obtaining any federal service, benefit, employment or voting;<sup>189</sup> voting in a federal election;<sup>190</sup> failing to disclose one's role as a preparer of a false application for immigration benefits,<sup>191</sup> knowingly presenting a document that fails to contain a reasonable basis in law or fact,<sup>192</sup> and high speed flight from an immigration checkpoint, defined as leaving at a speed in excess of the speed limit.<sup>193</sup>

From 1994 to 1998, the number of defendants charged with immigration offenses almost quadrupled

from 2,453 to 9,254.<sup>194</sup> Of those charged with an immigration offense in 1998, 94.8 percent were ultimately convicted, the overwhelming majority on a guilty plea.

In 1998, of all the federal law enforcement agencies, only the FBI exceeded INS in referring cases that were subsequently prosecuted.<sup>195</sup> Both the numbers of persons criminally prosecuted for immigration offenses and the severity of their sentences have increased. In 1992, the median sentence for an immigration-related conviction was two months. By 1998, it had risen to 24 months.<sup>196</sup> By the end of September 1998, seven percent of the 107,912 people serving a federal sentence had committed an immigration offense.<sup>197</sup>

In 1998, 43 percent of the cases referred by the INS to U.S. Attorneys were for illegal reentry.<sup>198</sup> Nineteen percent were for improper entry, and 17 percent for alien smuggling or harboring aliens.<sup>199</sup> INS referrals from the areas near the U.S./Mexican border increased by more than 500 percent from 1995 to 1998.<sup>200</sup> Not coincidentally, from 1990 to 1997 funding increased by 142 percent for U.S. Attorney's offices on the U.S./Mexican border, and by another 14 percent from 1997 to 1998. These increases significantly exceed the national rates of 89 percent and eight percent for the same periods.<sup>201</sup> The INS continues to devote the lion's share of its resources to border enforcement. In 1998, 91 percent of all Border Patrol agents worked on the U.S./Mexican border, and the number increased eight percent from the previous year.<sup>202</sup>

Not surprisingly, immigration-related crimes have overwhelmed federal courts in Texas and Arizona. In the town of Del Rio, Texas, defendants no longer appear in the same courtroom as the judge, but appear via video link. Until the surge in immigration prosecutions, a circuit-riding judge sufficed, but that is no longer enough to handle the caseload. So immigrants waive their right to appear in person to face the charges against them, and instead appear in front of a camera.<sup>203</sup> Defendants are sentenced en masse. Overcrowding has even led the INS to use a bus with barred windows as a holding cell.<sup>204</sup>

Unlawful entry into the United States has been a crime since 1952.<sup>205</sup> The first instance of unlawful entry constitutes a misdemeanor, while reentry after deportation is a felony.<sup>206</sup> As enacted in 1952, the maximum penalty for reentry after deportation was two years. The Anti-Drug Abuse Act of 1988 increased the penalties for reentry after deportation on criminal grounds.<sup>207</sup> The Sentencing Guidelines

require a minimum sentence of ten months for reentry by a person deported for a felony conviction, and a minimum of 51 months for those deported based on an aggravated felony conviction.<sup>208</sup>

Prosecutions for illegal reentry have increased. In the Central District of California, for example, the number of prosecutions for illegal reentry doubled from 1997 to 1998.<sup>209</sup> In Los Angeles, illegal reentry cases make up a fifth of the caseload of the U.S. Attorney's Office, more than any other crime.<sup>210</sup>

### *Mexican National Receives 41-Month Sentence for Illegal Reentry to Visit Ailing Permanent Resident Father*

"Mr. E-" is serving a sentence of 41 months for attempting to reenter the U.S. without inspection in order to visit his ailing father. During his mid-twenties, Mr. E- entered the United States without inspection. He came to the United States approximately two years after his father, who had entered in 1974. Mr. E- became a lawful permanent resident through the amnesty program in the 1980s. His father and five of Mr. E-'s siblings are either U.S. citizens or permanent residents of the United States.

During his tenure in the United States, Mr. E- was steadily employed as a carpenter. In 1995, at the age of 50, he was convicted of his only criminal act, delivery of a bag of marijuana to an undercover officer. He received a seven-year sentence for the offense, all of which was suspended. In May of 1997, after completing two years of probation successfully, Mr. E- was called to report to his probation officer. Upon arrival, he was arrested by the INS because his prior criminal conviction had made him deportable.

During the two years following his deportation, Mr. E- lived in Mexico, separated from most of his family, who continue to reside in the United States. In August of 1999, his ailing 81-year-old lawful permanent resident father requested that Mr. E- come to the United States to see him, as he feared he would soon die. In September 1999, at his father's request, Mr. E- attempted to reenter the United States via the southern border. He was apprehended by the Border Patrol and federally prosecuted for illegally reentering following his deportation. He is currently serving a 41-month sentence.

It has been a crime to make a false claim to U.S. citizenship since 1948.<sup>211</sup> To an immigrant desperate to

join family, claiming to be a U.S. citizen may not seem like an enormous offense. However, it can lead to criminal prosecution, deportation, and a permanent bar to admission.



Photo Courtesy: INS

### *Man Attempting to Return from Mexico to U.S. Citizen Wife and Two U.S. Citizen Children Imprisoned and Deported for Making False Claim to Citizenship*

At the age of 14, "Mr. P-," a national of Mexico, entered the United States without inspection. He has two brothers, both lawful permanent residents, who reside in this country. The remainder of his family (five siblings and parents) live in Mexico. Mr. P- attended high school in the United States and in 1995 married a U.S. citizen. Together, they have two U.S. citizen children, ages one and four. Mr. P- has been steadily employed

since high school, often working more than one job at a time to support his family. Prior to his departure from the United States, Mr. P- held three jobs. By day, he worked as a carpenter. At night, he was employed as a cook and a dishwasher in two different restaurants.

Although eligible for a family-based visa, Mr. P- has never held legal status in the United States. In early 1998, he returned to Mexico to visit family. He attempted to reenter the United States in February 1998 by claiming to be a U.S. citizen. He was detained and questioned by U.S.

officials. Ultimately, his undocumented status was discovered and he was taken into custody by U.S. Marshals. In June 1998, he was convicted of making a false claim to citizenship. He was sentenced to five months incarceration, leaving his wife, whose bi-weekly earnings as a sales clerk ranged between \$350 - \$400, to support their two children. Upon completion of his sentence, Mr. P- was deported.



Photo Courtesy: INS

## G. How Detention Divides Families

It would be difficult to exaggerate the hardship caused for newcomers and their families by the INS's detention system. Indeed, the word "detention" represents something of a misnomer. In fact, the INS imprisons immigrants, often far away from their families, in abysmal conditions as they wait for their immigration cases to run their course or for the INS to remove them from the United States. Most detained immigrants languish in local jails, which the INS pays a premium to use, but does not effectively oversee.<sup>212</sup> Localities regard these immigrants as a "cash crop" and jailers know that their profit margin turns on how little they spend on services for them.<sup>213</sup> Beyond local jails, the INS's patchwork of detention facilities includes its own "service processing centers," for-profit prisons, and Bureau of Prisons' facilities.

The harsh living conditions in INS prisons and contract facilities have led to hunger strikes, suicide attempts, and pervasive despair.<sup>214</sup> They have caused asylum-seekers to riot.<sup>215</sup> In some sites, jailers commingle non-criminals with criminals, with predictable consequences.<sup>216</sup> Officials consistently ignore, minimize, or improperly treat severe health problems.<sup>217</sup> Overcrowding creates virtually unlivable conditions in many facilities. Despite their great need for advocates, only 11 percent of detained immigrants are represented by legal counsel.<sup>218</sup> Jailers suppress religious expression, as illustrated by the recent cancellation of a Bible study class in one facility for discussing, consistent with the standard liturgical schedule, a passage on welcoming the stranger.<sup>219</sup>

Despite the INS's disgraceful record in this area, the 1996 Immigration Act mandated the detention of vast categories of immigrants, including virtually all immi-

grants who have been ordered removed (deported) based on past criminal convictions,<sup>220</sup> asylum-seekers who have fled to the United States without proper documents,<sup>221</sup> and persons ordered removed by an immigration judge for 90 days.<sup>222</sup> Many detainees, particularly those with strong family ties, do not represent a flight risk or danger to the community, but in most cases the law does not allow these factors to be considered.

"Mandatory" detention, without the possibility of release, has led to the confinement of thousands of immigrants each year. Since passage of the 1996 Immigration Act, the INS has nearly doubled its detention capacity, from 8,592 beds a night in 1996<sup>223</sup> to 17,400 beds.<sup>224</sup> In 1998, the INS detained 153,517 persons.<sup>225</sup> Based on INS projections of the number of immigrants who will likely be subject to mandatory detention and their average length of stay, upwards of 370,000 immigrants could be detained in subsequent years. An estimated 5,000 immigrants (at any one time) face indefinite custody.<sup>226</sup> They have been ordered removed, but cannot secure travel documents to their countries of birth or to third countries. They languish in a legal no-man's land, separated from their families for months and years on end.<sup>227</sup>

Detention physically separates thousands of families in the United States each year. Furthermore, INS detention practices — like the remoteness of facilities, frequent transfers, strict visitation policies, and exorbitant telephone rates — create practical barriers to the maintenance of even the most attenuated contacts with family and the outside world.<sup>228</sup> The stream of human rights reports and articles that document these problems suggest the devastation worked on thousands of individual detainees, their spouses, children, and even extended family. Depression, grief, and impoverishment lie behind these cases.

Consider, for example, the Pennsylvania boy who told a tearful audience: "If you take away my dad, my family couldn't make it financially ... But more important, I know that I would fall apart .... How can I have a future without my father?"<sup>229</sup> His father, a lawful permanent resident who had lived since his infancy in the United States, faced removal for a ten-year-old drug conviction. Or the detained Chinese asylum-seekers who were not allowed to keep photographs of their children in prison.<sup>230</sup> Or the indefinitely detained Cuban transferred eight times during his 12 years in detention, but never to sites accessible to his family.<sup>231</sup> Or the mother and young sons placed in separate detention centers to await

their political asylum cases.<sup>232</sup> Or the children of detainees who come to visit their parents on weekends and burst into tears when prison officials turn them away.<sup>233</sup>

The stories below highlight the impact of detention on families from different perspectives — children whose parents are detained, spouses isolated from each other in detention, and extended family who bear the harsh emotional and financial consequences. These case studies do not exhaust every scenario, but they do highlight the devastating impact of detention on American families.

### *Husband and Wife Detained in Separate Pods and Away from Their Children*

In March 1998, the INS took “Mr. and Mrs. M-”, political asylum-seekers from El Salvador, into its custody, leaving their 21- and 18-year-old daughters and a 16-year-old son to fend for themselves. For 16 months, Mr. and Mrs. M- lived in (separate) overcrowded “detention” pods, where they were required to remain — to sleep, eat, shower, and use the bathroom — 23 hours a day. Separated from each other and from their children, Mr. and Mrs. M- tried to maintain their spirits through Bible study and helping other detainees.<sup>234</sup> Apart from the absence of privacy, they endured shoddy medical care and, in the husband’s case, threats from gang members. Mrs. M- now tests positive for tuberculosis. In fact, exposure to tuberculosis and other infectious diseases threatens to reach crisis proportions in crowded, poorly ventilated INS facilities.<sup>235</sup> Mr. M-, in turn, nearly died from a burst appendix that the detention authorities neglected to treat for two days. According to the couple, the facility’s health clinic typically provided detainees with Tylenol, whatever their symptoms.

Prior to their detention, the family owned a triplex, living in one unit and renting the other two. Without their parents, the children could not meet the mortgage payments, and were evicted in November 1998. After their eviction, the oldest child dropped out of college and took part-time work as a parking attendant to support her siblings. She lived with friends. The second daughter cleaned, cooked, did laundry and cared for two children, in return for lodging for her brother and herself. Mr. and Mrs. M- sent the children any money they could scrape together by selling their food rations and artwork to other detainees.

In July 1999, the couple was released from detention, without work, a home, health insurance, or means of support. One week prior to their release, each underwent a medical examination that included chest x-rays. While Mrs. M- was only x-rayed once, Mr. M- received x-rays on four consecutive days. Mr. M- requested his medical records, but did not receive them and was told that “no news is good news.” In January 2000, after his release, Mr. M- developed a severe cough. A second round of x-rays revealed a cancerous tumor in his lung. In early February, doctors removed half of his lung. The doctors have told Mr. M- that a tumor of the size removed could not have developed in the six months since his release from detention.

### *Detention and Deportation of the Father and Sole Means of Support for Four Children*

“Mr. E-” came to the United States in 1969 as an agricultural worker. In 1983, he married a U.S. citizen farmworker. He became a permanent resident in 1986. The couple had four children, all U.S. citizens by birth. Although the family traveled during the summer to work the crops, they made their permanent home in Florida.

In 1993, Mr. E-’s wife left him, moved three hours away, and effectively abandoned her children. Shortly thereafter, Mr. E- travelled to Mississippi to work, leaving his children with their maternal grandfather. The Mississippi crop failed and Mr. E- returned to Florida. At that point, desperate for work, Mr. E- made what he has since characterized as the worst mistake of his life, agreeing to transport marijuana for a friend from Texas to Florida. Mr. E- was arrested in Mississippi, en route to Florida, in June 1993. He was arraigned and released on bail. He returned to Florida and skipped bail. In August 1997, he was arrested in Mississippi, where he had returned to work. In April 1998, he was convicted of possession of less than a kilogram of marijuana, and sentenced to two years in prison. In August 1998, Mr. E- finished serving his prison sentence, and was transferred to INS custody at the federal Bureau of Prisons’ detention center in Oakdale, Louisiana. In November 1998, an immigration judge ordered Mr. E- removed based on his conviction. Because of changes made in the law by the 1996 Immigration Act, the judge could not consider Mr. E-’s family ties or his 29-year residence in the United States. Mr. E- decided that he could not stand to remain in



Photo Courtesy: INS

detention during a lengthy appeals process, and submitted to removal in December 1998. He has not seen his children since.

Mr. E- represented the exclusive means of support for his 19- and 18-year-old daughters, twin 10-year-old sons, and an infant grandchild born during his incarceration. All of these children are U.S. citizens. In their father's absence, they have lived by themselves in a two-bedroom mobile home without air conditioning. In August 1997, a court ordered their mother to pay \$400 a month towards their support, but her wages as a migrant laborer do not allow her to send even close to this amount. The children's grandfather gives them \$40 to \$60 a week, or whatever his wages as a farmworker crew chief allow.

The daughters act as parents for the younger children, at great personal sacrifice.<sup>236</sup> The oldest quit high school and now works to help support the family. The second daughter graduated from high school, but has had to drop out of technical school, and now cares for the children full-time. In their father's absence, the twin boys have not done well in school. One of the boys, who is currently repeating a grade, does not complete his assignments, arrives late, talks during class, and does not attend his after-school program. Because the children no longer speak Spanish in their home, communication with their father, even by phone, has become difficult. They hope to visit him in Mexico soon.

### *The Impact of Even Short-Term Detention on Family*

"Ms. V-" entered the United States from Colombia with her parents and seven siblings in 1974. She has been a permanent resident since her arrival. She is the single mother of a 12-year-old U.S. citizen daughter. In 1995, Ms. V- was convicted for attempted theft of a \$9.99 tablecloth from a department store. She served 13 days for her crime. In 1999, she served two months for a second petty larceny conviction, this one for stealing a wallet valued at \$7.99. Following Ms. V-'s release from jail in June 1999, the INS took her into custody. In October 1999, an immigration judge found Ms. V- eligible to remain in the United States. However, in that short period, great damage had been worked on her family.

Ms. V-'s daughter did not visit her mother in detention and could only speak to her by phone twice a month. The girl pled to the immigration judge hearing her mother's case: "If you send my mom away, you send my life away." Not surprisingly, the girl began to suffer from depression, refusing to attend school, bathe, or otherwise care for herself. She was taken to a therapist and put on medication. Ms. V- missed her daughter's twelfth birthday and her elementary school graduation. When Ms. V- was finally released, she hoped to spend more time with her daughter. Instead, she was forced to

take two jobs to pull herself out of debt. She works from 9 a.m. to 3 p.m. and then 5 p.m. to 10 p.m., a schedule that leaves her little time with her daughter.

Prior to her detention, Ms. V- worked as a janitor for the federal government. Her work schedule allowed her to care for her elderly and ailing U.S. citizen mother. Ms. V- would bathe and dress her mother, and take her shopping and to the doctor. She also helped to support her mother financially. In Ms. V-'s absence, her sister was forced to quit her jobs as a nurse's aide and maintenance worker to care for their mother. The sister also

took in Ms. V-'s daughter. During this time, the sister's family — including her four children, her mother, and Ms. V-'s daughter — relied exclusively on her husband's modest salary for support. The loss of family income combined with increased expenses prevented the family from meeting their monthly tax payments on their home. Since Ms. V-'s release, her sister has not been able to secure new employment. The family recently received notice that their house will be put up for sale if they cannot meet their tax payments within the month.

## H. The Impact of Workplace Raids on Families

The INS has broad authority to enforce immigration laws and to arrest persons residing in the United States without legal permission.<sup>237</sup> INS enforcement tactics include workplace raids, audits of employer records, and the initiation of removal proceedings against persons in the criminal justice system.<sup>238</sup> Persons caught in INS raids constitute a small percentage of the total number of people removed by the INS each year. In 1998, for example, the INS caught nearly 14,000 people in raids, but removed in total 171,510.<sup>239</sup> Nonetheless, undocumented persons and their families live in great fear of raids.

In March 1999, the INS announced a new strategy for preventing the undocumented from working, which would decrease its reliance on raids. Under the plan, the INS would concentrate on “removing criminal aliens, cracking down on alien smuggling rings, document counterfeiters and employers who hire undocumented workers [and] ... [working] with communities to solve local immigration complaints.”<sup>240</sup> In addition, the INS announced the deployment of “Quick Response Teams” to enhance its interior enforcement strategy. Forty-five such teams were sent to communities across the country to “apprehend and remove illegal aliens encountered by state and local law enforcement officials in the regular performance of their duties.”<sup>241</sup>

The INS numbers reflect a decrease in work site enforcement activities overall in 1998 and 1999, and perhaps a shift in policy that had already been under way. Successful completions of employer cases, which include “investigations that target employers who knowingly hire or continue to employ illegal aliens,” dropped by 22 percent from September 1998 to September 1999.<sup>242</sup> As evidence that the March 1999 INS announcement reflected a policy already in place, the number of successfully completed employer cases declined by 40 percent from September 1997 to September 1998.<sup>243</sup>

However, although the percent of employer cases is decreasing, the total number of persons removed by the INS increased between 1997 and 1998. The U.S. removed 114,386 immigrants in FY 1997 and 171,154 in FY 1998.<sup>244</sup> In FY 1999, removals totaled 176,990.<sup>245</sup> In other words, the INS may have decreased its emphasis on employer-based

enforcement as a *percentage* of its enforcement activities, but this has not necessarily translated into a decrease in the *number* of raids or the families impacted by them.

Indeed, the INS continued to conduct workplace raids across the country even after its announced shift away from workplace raids. In Washington State, the INS targeted construction sites and apple-packing plants. It arrested 14 workers at a May 19, 1999 raid in Seattle, in an action that union officials believe was related to labor-organizing efforts.<sup>246</sup> The INS arrested 25 workers at a raid on May 26, 1999 and 21 workers at a raid in Selah on August 5, 1999.<sup>247</sup> Another 20 people were arrested at a local chain of Seattle restaurants at the beginning of September 1999.<sup>248</sup> The INS carried out a series of raids on garment factories in New York City during the summer. Forty-one workers were arrested during four raids between June 28 and July 7, 1999. Twenty-five workers were arrested at two raids on August 12.<sup>249</sup> The INS arrested another 47 workers at four raids during September 1999.<sup>250</sup> Another 25 persons were arrested during a November 4, 1999 raid of a garment shop in New York City.<sup>251</sup>

In a variation on workplace raids, the INS conducted a series of apartment raids in Providence, Rhode Island during September, 1999. Eleven people were arrested in their homes.<sup>252</sup> The INS arrested eight workers at a Holiday Inn raid in Minneapolis on October 13, 1999, and 33 at a construction site the next day, in Arlington, Virginia.<sup>253</sup> The INS raided the Holiday Inn again in November 1999. The workers believe a manager called the INS in retaliation for union activity.<sup>254</sup> In Miami, Florida, the INS raided a factory, arresting more than 60 people on October 27, 1999, transporting them in handcuffs to the Krome detention center.<sup>255</sup>

Once a person is arrested by the INS in a workplace raid, they are referred to an immigration judge for removal proceedings. As discussed previously, few defenses to removal based on family ties in the United States have survived the 1996 Immigration Act. Even a person who has been approved for a family-based visa petition will generally not be allowed to remain in the United States until his or her visa becomes available. Instead, he or she will be separated from the petitioning U.S. citizen or lawful permanent resident family member and forced to return to his or her country. Upon his or her departure from the United States, the person may trigger the bars to

admission. If the person fails to depart during the required period, he or she will be ineligible to adjust status to permanent residence in the United States. Instead, the person will be forced to leave the country and face the consequences of not previously complying with the law.

*Raid on Workplace Threatens to Separate Woman from Her U.S. Citizen Daughter and Elderly Permanent Resident Mother*

“Ms. A-,” an Ecuadorean national, has been living in the United States since 1995. She lives with her permanent resident mother and her young U.S. citizen daughter. Ms. A-’s mother petitioned for Ms. A- to become a permanent resident, and Ms. A- is waiting for her priority date to become current. During the day, Ms. A- works and her mother takes care of Ms. A-’s daughter. Ms. A- also helps her mother around the home. Her mother has osteoporosis and cataracts, a combination that puts her at risk of serious injury. Her health problems make it difficult for her to work outside the home or to take care of all the household chores.

Ms. A- came to the United States in order to help her mother and to make a better life for herself. Ecuador is in a state of financial crisis. In her job in Ecuador, Ms. A- earned the equivalent of \$50 per month. She would not be able to support her mother or daughter at that income level.

Ms. A-’s daughter has speech and learning disabilities. She is receiving medical care and therapy for her disabilities. Ms. A- is anxious to continue treatment for her daughter, because her daughter is at a critical stage in her development. Ms. A- believes her daughter will live a relatively normal, healthy life if she can get the early medical and therapeutic intervention she needs. Ms. A- would not be able to obtain or afford this treatment for her daughter in Ecuador.

Until August 1999, Ms. A- worked at a factory in Brooklyn, New York. “I always lived in fear of a raid,” she says. “Every day I came in to work I asked God that nothing would happen.” One morning about 20 INS agents in civilian clothing came into the factory and arrested all the workers. They transported Ms. A- and about 40 others, hands tied behind the back, to the INS office in downtown Manhattan. At the office, one of Ms. A-’s arms was cuffed and chained to the furniture. The INS officers ordered her to lift her shirt and pull down her pants. “I was very, very upset by the handcuffs and showing my body. I don’t know why they did that to me. I am not a delinquent. My only crime is to not have papers,” Ms. A- said of her arrest.

The INS agents questioned Ms. A- about her presence in the United States, and photographed, fingerprinted, and released her with an order to attend immigration court proceedings. Ms. A- has kept her appointments with the immigration judge and she is waiting to see what will happen.<sup>256</sup> However, her prospects for avoiding removal are poor. Although she has an approved visa petition, she will not have a current priority date for more than two years. The immigration judge has no authority to close her case for so long and wait until she is eligible to adjust status to residency.

Ms. A- is desperate to remain in the United States with her daughter and her mother. She wants to continue with therapy and medical care for her child. She needs to help support her ailing mother and she needs her mother to take care of the little girl while she is at work. The grandmother loves and cares for the girl, who needs special attention. Together, the family functions and survives. Separated, they would face poverty, sorrow, and the loss of quality care for the girl’s disabilities.



Photo Courtesy: INS

## I. Deaths on the Southern Border

Nothing so fractures immigrant families as the death of family members in their attempts to cross the U.S./Mexican border. While illegal entrants do not enjoy a broad constituency in the United States, many come to join family in the only way the law allows. Expanded border enforcement activities make their crossings ever more perilous.

Despite the numerous ways in which an immigrant may become undocumented, the INS has traditionally viewed the U.S./Mexican border as the country's major gateway of unauthorized immigration, and has concentrated its resources accordingly. In 1994, it developed and implemented a new enforcement strategy along the border. Under the principal of "prevention through deterrence," the Border Patrol more than doubled its forces on the U.S./Mexican border, as well as updated its technology, in order to raise the risk of apprehension to the point that it became "so difficult and so costly to enter [the United States] illegally that fewer individuals would try."<sup>257</sup>

The dramatic increase in the number of Border Patrol agents along the more established paths used by border crossers has shifted undocumented crossings from urban, traditionally "safer" routes, to more remote areas "less suited for crossing."<sup>258</sup> As a result, the number of crossing deaths has increased. In November 1999, during a visit to the border at Tijuana, the U.N. High Commissioner for Human Rights criticized U.S. enforcement policy for endangering the lives of immigrants.<sup>259</sup>

In 1998, the U.S. Border Patrol began centralizing

records of deaths recorded by the INS's border sectors. The agency documented 261 deaths in fiscal year 1998 and 230 deaths in 1999.<sup>260</sup> However, these numbers include only victims found on the United States side of the border. A study conducted by researchers at the University of Houston more accurately reflects the number of fatalities. The study documents more than 1,600 possible migrant deaths along the U.S./Mexican border between 1993 and 1997.<sup>261</sup> In the first three months of 2000, an estimated 37 people died attempting to cross into California alone.<sup>262</sup>

Criticism of the border enforcement strategy has prompted the Border Patrol to launch a border-wide public safety campaign. The initiative brings together Mexican and local U.S. officials in border communities to focus on prevention, rescue and identification. Such initiatives, though laudable, will not stop attempted illegal entry through deadly terrain. The desire for family reunification, in the only way the law permits, will continue to override safety concerns. And immigrant families will continue to suffer as their loved ones perish.

### 1. Treacherous Conditions, Unscrupulous Coyotes, and the Desire for Family Reunification and Work: A Deadly Mix

Family reunification and work opportunities represent the primary reasons that undocumented border crossers come to the United States. Immigrants who enter the United States via the U.S./Mexican border come mostly from Mexico and elsewhere in Latin America. A sense of duty to one's family members, the poverty in these countries, and a booming United States economy fuel undocumented migration north.

In order to evade Border Patrol agents, crossers have resorted to more dangerous, less monitored terrain. Some attempt passage through mountainous regions where they are threatened by unpredictable weather, dangerous trails, and hypothermia. Many succumb to dehydration and heat stroke. Others are swept into covered irrigation ditches by the unpredictable flow of the Rio Grande. Still others have perished in snow storms.<sup>263</sup> Some suffocate in sweltering railroad cars.<sup>264</sup> To negotiate these dangers, increasing numbers of immigrants use smugglers and "coyotes."<sup>265</sup>

For coyotes, human lives are often expendable. Smugglers often leave behind those who cannot maintain the pace required to avoid Border Patrol

agents. For most victims, the chances of being rescued in the desert are minimal. And for their families, hopes of reunification are irrevocably destroyed. In one particularly wrenching case, a deported mother perished while trying to reenter the United States to rejoin her family. Prior to her deportation, she had lived in Oklahoma City with her husband and two-year-old son. In June 1998, Rosa Palomino Perez de Cardenas paid a coyote to help her return to her family. While crossing in the desert near Nogales, Arizona, Mrs. Cardenas was abandoned by her coyote and died of heat exposure in 105-degree heat.<sup>266</sup>

Since the implementation of the 1994 border enforcement strategy, deaths arising from heat exhaustion and dehydration have soared. Researchers at the University of Houston have noted a dramatic increase in the number of deaths related to environmental factors, such as heat, cold, and dehydration. From 1993 to 1997, the number of such recorded deaths jumped from 12 to 64.<sup>267</sup> During 1998, the Border Patrol attributed 87 of 261 deaths (33 percent) to heat exposure. In 1999 the agency found that 51 of 230 deaths (22 percent) resulted from heat exposure. According to Border Patrol, heat exposure is the second leading cause of death among its crossers, just behind drowning.<sup>268</sup>

## 2. The Death of Family Members During Attempted Border Crossings

The unforgiving penalties imposed by current immigration law, high application filing fees, and increasingly lengthy backlogs force many immigrants to take extreme measures to enter or reenter the United States. Their deaths particularly devastate their families, which often include U.S. citizens and lawful permanent residents.

### *Undocumented Immigrant Perishes in Attempt to Rejoin U.S. Citizen Wife, Three Children, and Lawful Permanent Resident Parents*

In the early 1970s, "Mr. L-" was born into a family so stricken with poverty that his mother was forced to feed him tortillas she picked from the garbage. Driven by a poor Mexican economy and a struggle to feed nine hungry mouths, in the early 1980s Mr. L-'s father, "Mr. R-," left his wife and nine children in Mexico to work as a farm laborer in the United States. He legalized his

status in the United States through the agricultural worker program. His wife joined him in the United States by crossing the border illegally and has subsequently become a lawful permanent resident.

Mr. L-'s mother brought him to the United States at the age of 12. Five years later, he married a U.S. citizen. Together, they had three U.S. citizen children for whom Mr. L- was the sole source of financial support. In 1992, Mr. L-'s U.S. citizen wife filed an immigrant visa petition on his behalf. The petition was approved and Mr. L- was scheduled for an immigrant visa interview at the U.S. consulate in Ciudad Juarez, Mexico. However, Mr. L- could not afford the trip to Mexico from his home in Washington state. As his interview date came and went, Mr. L- lost his opportunity to become a permanent resident of the United States.

Until the mid 1990s, Mr. L- provided for his U.S. citizen family by working as a forklift operator. However, frustration and anxiety over his prolonged undocumented status prompted him and his wife to visit their local INS office. At the office, Mr. L- was arrested, separated from his wife, and deported to Mexico. Within two weeks, he returned by crossing the border illegally.

For the next three years, he continued to work and support his family. In June 1998, INS officials arrested him and he was again deported. Two weeks after his deportation, he phoned his mother from Mexico. He was desperate to return to his wife and children, but needed at least \$1,500 to pay a coyote to guide him across the border. His mother, who made her living by packing apples, was only able to send him money to cover the cost of his bus tickets to and from the border.

The next time Mrs. R- heard from her son (July 1998), he informed her that he had made three attempts to cross the border, all of which had failed. On his third attempt, he had been fingerprinted and photographed by the Border Patrol. He feared that if caught again, he would be imprisoned. He told his mother not to worry because he had a new plan. A friend knew of a point in the desert where one could cross the border without being detected. Mr. L- planned to try the journey alone. Mrs. R- pleaded with her son not to take the risk.

Mr. L- dismissed his mother's concerns and promised to contact her as soon as he reached the U.S. In mid-August, with no word from her



Photo Courtesy: INS

son, Mrs. R- began searching for him. She started at a Border Patrol office in California, where she showed officers a picture of her son. An agent instructed Mrs. R- to inquire at the Mexican consulate. After explaining the situation to consular officials, they promised to investigate the matter. She gave them the phone number of her daughter who resided in California, and asked the consulate to call if they received any information. Then Mrs. R- traveled to Mexico, to the home of her niece with whom her son had stayed prior to his departure. No one in Mexico had seen him in weeks.

Nine days later, her daughter arrived from California with news from the Mexican consulate. The Border Patrol had found Mr. L-'s partially decomposed body in the desert next to a bike and an empty water gallon, between Mexicali and Tijuana. Mr. L- had died approximately one month prior to his body's discovery. Although the family could not view the body, his shoes, a description of his tattoos, and the addresses of relatives found in his pockets confirmed his identity.

After his father's death, Mr. L-'s youngest son refused to eat. He clung to photos of his father, repeating, "I want my Daddy." Today, Mr. L-'s children are nine, seven, and five years of age. Since his death, his wife has been forced to relocate to her mother's home and to apply for public assistance. The family lives 90 miles away from Mr. and Mrs. R-. When the children visit during school vacations, they look at Mr. L-'s picture. The oldest writes their father letters and tells her grandmother that sometimes when she closes her eyes, she sees her father and talks with him.<sup>269</sup>

### *Undocumented Immigrant Attempting to Return to Pregnant U.S. Citizen Wife and Child, After Visit to Ailing Father in Mexico, Perishes with Niece and Nephew in Desert*

In 1998, Julio Gallegos, a native of Mexico, married Jackie Gallegos, a U.S. citizen and native of California. After their marriage, Mr. Gallegos found a factory job in Los Angeles. Mrs. Gallegos began working in a dentist's office. In addition, the couple had their first son. As a U.S. citizen, Mrs. Gallegos could petition for an immigrant visa

for her husband. As the spouse of a U.S. citizen, Mr. Gallegos was immediately eligible for an immigrant visa. Mr. and Mrs. Gallegos intended to complete the paperwork to secure Mr. Gallegos' lawful permanent residency after their marriage. However, the costly process was beyond their means, and they never completed the necessary petition and application.

In January 1998, Mr. Gallegos returned to Mexico to be with his father who had fallen seriously ill. In his absence, Mrs. Gallegos discovered that she was pregnant. During one of their phone calls, Mrs. Gallegos informed her husband of her pregnancy. Mr. Gallegos was anxious to return to his wife, but the escalating costs of crossing the border with a coyote prohibited him from immediately doing so. Mrs. Gallegos tried to assist him by sending him what money she could. However, the two \$50 installments she sent her husband were not nearly enough. Finally, Mr. Gallegos' brother offered to pay the coyote's fee, if in exchange, he allowed his niece and nephew to accompany him on the journey. Mr. Gallegos agreed. They quickly found a coyote who promised to guide them across the border. Unfortunately, the coyote was an experienced con artist, who did nothing more than rob them of their money. Mr. Gallegos phoned his wife in June 1998 to inform her of their misfortune. This was the last contact Mrs. Gallegos had with her husband.

Mr. Gallegos did find another coyote to lead him, his niece, and his nephew across the border. This time, however, the coyote abandoned them in the desert, where Mr. Gallegos and nine others, including his niece and nephew, perished in the scalding heat. Over the course of six weeks, the Border Patrol discovered their bodies.<sup>270</sup> The deaths of the nine persons found in Mr. Gallegos' group are thought to be the largest number of border crossers who perished in the desert since the 1970s, when a group of 14 Central Americans died in Arizona.

### *Farmworker Dies Attempting to Cross Southern Border Leaving Behind Wife and Six Children*

Fernando Salguero Lachino was from Charo, a village of roughly 1,000 located west of Mexico city in the state of Michoacan. He was a member of Mr. Gallegos' ill-fated border crossing group. Mr. Lachino had begun working in the United States as a farmworker at the age of 44. He had

lived and worked mostly in California and Washington, picking cherries, apples, pears and other crops. Every two months, he sent \$300 home to his wife and six children in Mexico. After working for six to eight months, Mr. Lachino would return home to his family in Charo, Mexico. However, limited employment opportunities in Charo would force Mr. Lachino to leave his family and return to the United States during planting and harvest seasons. In late June 1998, his final attempt to reenter the United States failed. The Border Patrol did not find his decomposed body until mid-August 1998.<sup>271</sup> Mr. Lachino's family did not learn of his death for nearly two months. This wait proved tortuous for them. He is survived by six young children and his wife in Mexico.

## **3. The Inability to Find, Retrieve, or Identify the Bodies of Family Members**

Many border crossers elect not to carry identification, in an effort to remain anonymous if captured by the Border Patrol. Such decisions further complicate the process of identifying victims. Professor Nestor Rodriguez, a researcher at the University of Houston, was contacted by "Ms. A-," a native of Guatemala, who feared that her brother had perished while crossing the border. She was distraught because his body had not been found or returned to the family.

Ms. A- explained that eight years ago, her brother, "Mr. H-," had left his native country of Guatemala for the United States. Upon reaching the U.S.- Mexico border at Matamoros, Mexico, he called his family to let them know that he would arrive in Houston within a half day. Shortly after his phone call, he and his traveling companion attempted to cross the border near Brownsville by swimming the Rio Grande. Their attempt ended in tragedy, when Mr. H- drowned. Mr. H-'s traveling companion, also a close family friend, informed the family of Mr. H-'s death. The family never recovered Mr. H-'s body. Mrs. A- provided Professor Rodriguez a photo of her brother and asked for his assistance in locating his body.

With the photo and an approximate date of crossing, Professor Rodriguez searched both United States and Mexican records. In Brownsville, he discovered a newspaper article that reported the death of a man who drowned in the Rio Grande near the time of Mr. H-'s death. The article did not identify the victim. In Mexico, he found a newspaper clipping that published Mr. H-'s name and showed a photo of his body being



Photo Courtesy: INS

pulled from the river by U.S. officials in Brownsville. Professor Rodriguez returned to Brownsville and found the local funeral home that had embalmed Mr. H-'s body. The funeral home informed Rodriguez that 48 hours had passed before Mr. H-'s body had been pulled from the water, and as a result, his face had been completely disfigured. However, a medallion of the Virgin Mary had been found with his remains. Upon questioning the family about the medallion, Rodriguez learned that Mr. H-'s wife had given him the medallion the day he left Guatemala.<sup>272</sup>

The process of identification of Mr. H-'s body illustrates the challenges associated with returning bodies to their families. Identification is a complex and time consuming task that many poor families cannot undertake. Unidentified victims are often buried in potter's fields or paupers' graveyards, with no headstones or burial services. In some places, small wooden crosses bearing dates and identification numbers are planted, but these are quickly weathered by rain and sun. Of the deaths recorded by the U.S. Border Patrol in FY 1999, 39 percent were unidentified, down slightly from 42 percent in fiscal year

1998.<sup>273</sup> According to the Border Patrol, ultimate responsibility for identification of deceased border crossers lies with local sheriff's offices and the foreign consulates.

#### 4. Tightened Borders Mean Greater Separation of Families and More Difficulties in Maintaining Family Ties

Immigrant advocates have noted another consequence of increased border enforcement: the hardship faced by family members left behind. In one Mexican city, the mayor estimates that 60 percent of its workforce spend part of each year working in the United States.<sup>274</sup> Historically, undocumented immigrants working in the United States felt confident that they could return to the United States after trips home to visit their family members. However, as the stakes associated with border crossing have risen, undocumented immigrants in the United States have begun to forgo annual visits home. This phenomenon carries a high price for children and the elderly. Children left in the care of relatives while their parents seek to support them from the United States lose out on these important relationships.

To avoid multiple border crossings throughout the course of a year, some undocumented workers have begun to relocate their immediate family members to the United States, leaving behind extended family members who are too old to make the trip north. The elderly, who rely on their own children for support in their old age, are unfortunate victims of this permanent migration. One orphanage in Mexico recently reported having to open its doors to an increasing population of elderly persons left with no support systems after their children permanently moved north.<sup>275</sup>

## J. Preying Upon Immigrants: the Human Toll of Unauthorized Legal Practice

As the ability of families to reunify legally in the United States has diminished, immigrants have become ever more vulnerable to the dishonesty and incompetence of unauthorized legal practitioners.<sup>276</sup> Attorney General Janet Reno has acknowledged that as “legal opportunities for benefits and relief from deportation diminish, more and more immigrants will fall prey to scams that promise a ‘green card’ with no strings attached but a substantial fee.”<sup>277</sup>

Immigrants fall prey to unlawful practitioners for a variety of reasons, including lack of English proficiency, the complexity of immigration law and policy, and understandable feelings of desperation – desperation that a relative may be deported, that a family may be separated, that a loved one may be returned to a dangerous country. Add to those factors the shortage of affordable legal assistance and the result is an epidemic of abuse.<sup>278</sup>

### 1. Unauthorized Practitioners Prejudice the Ability of Immigrants to Legalize Their Status

Not only do unscrupulous “notarios,” “visa consultants,” and self-proclaimed “attorneys” raise false hopes and cheat immigrants out of their scarce savings,<sup>279</sup> they also permanently prejudice many immigrants (and their families) who otherwise could have legalized their immigration status in the United States.<sup>280</sup>

#### *Immigrant Loses Ability to Adjust to Permanent Resident Status Due to Negligence of Unauthorized Practitioner*

“Ms. O-” visited Esperanza Rosales’ office in October 1994 in order to obtain a replacement for her temporary resident card and apply for lawful permanent resident status.<sup>281</sup> Ms. Rosales operated a business called “Oficina de Legalizacion y Empleo” from her home and office in Michigan. She claimed to be an attorney. Ms. O- paid Ms. Rosales to file her application to the INS for lawful permanent resident status.

Ms. Rosales selected and completed the form, advised Ms. O- on the process to be followed, and filed Ms. O-’s application for permanent resident status with the INS. Ms. Rosales never obtained Ms. O-’s home address, but instead used her own business address on the INS application and assumed the role of Ms. O-’s representative.

Due to the increase in the application fee, the INS returned Ms. O-’s application to Ms. Rosales. The INS denied the application and sent this notice to Ms. Rosales as well. However, she did not tell Ms. O- of the INS denial and the need to submit an additional fee until after Ms. O-’s opportunity for filing her application for permanent resident status had expired.

#### *Unauthorized and Incompetent Legal Representation Leads to Loss of Eligibility for Family Reunification and Deportation*

In April 1995, “Mr. R-,” a Mexican national, and “Ms. R-,” a U.S. citizen, were married in Texas.<sup>282</sup> They visited Ms. Rosales at her office in Michigan and hired her to help adjust Mr. R-’s status to lawful permanent resident.

While adjusting one’s status can be relatively simple, Ms. Rosales did not follow the proper procedure.<sup>283</sup> In April 1996, the INS detained Mr. R- in Texas. Because the correct INS forms had not been submitted on Mr. R-’s behalf, deportation proceedings were instituted and a hearing scheduled. When Ms. R- contacted Ms. Rosales about her husband’s situation, she advised Ms. R- that her husband did not need to retain a lawyer in Texas and that he should skip his deportation hearing. Ms. Rosales assured Ms. R- that her husband’s case would be transferred to Michigan.

When Mr. and Ms. R- returned to Michigan, they went to Ms. Rosales’ office, and paid an additional \$800 for preparation of an INS form that should have been filed initially. Ms. Rosales prepared this document with knowledge that the application contained false information; it claimed that Mr. R- had never been in deportation proceedings.

On September 19, 1996, the INS sent a notice to Mr. R- that he had been ordered deported for failure to appear at his deportation hearing. Mr. and Ms. R- returned to Ms. Rosales and demanded the INS documents in her possession,

but Ms. Rosales refused to provide them unless the couple made further payments.

In late April 1997, Mr. R- appeared at a scheduled appointment at the INS district office in Detroit, at which time he was jailed and processed for deportation to Mexico. On the same date, his wife filed an emergency application for stay of deportation.

The INS approved a one-year stay of deportation. With the assistance of public service attorneys, Mr. R- eventually obtained lawful permanent residence in the United States and avoided being separated from his wife and infant child.

### *Unlawful Practitioner Files False Asylum Claims on Behalf of Unwitting Victims, Permanently Prejudicing Their Ability to Obtain Legal Status in the United States*

Julia P. Sprately, along with others, operated two businesses that provided immigration services in the Los Angeles area.<sup>284</sup> From 1995 until September 1999, she created and filed hundreds of false asylum applications with the INS. After unwary immigrants paid an initial \$250 fee, Ms. Sprately and others prepared an application for asylum on their behalf. In the asylum applications, Ms. Sprately and others falsely claimed that the applicants had come to the United States to flee political persecution. The unwitting applicants, who were not aware of the fraudulent asylum applications, were told to wait. Sometimes the immigrants were charged more money for additional services, such as help with obtaining permission to work based on the pendency of the false asylum applications.

### *Couple Defrauded by Notary*

“Mr. and Mrs. X-” entered the United States from Mexico in 1988. Mr. X- went to a notario, William Arboleda, in May 1995 because he thought that he and his wife still qualified for legal residency under a 1986 federal amnesty program.<sup>285</sup> Although they did not qualify, Mr. Arboleda persuaded them to apply anyway and charged them \$3,500. Mr. and Mrs. X- paid half of the fee. At an INS hearing in December, the couple was told that their application was fraudulent. The notario had processed a form for political asylum, not amnesty, and indicated that Mr. and Mrs. X- were from Guatemala, not

Mexico. The INS began deportation proceedings against the couple. When Mr. X- went back to Mr. Arboleda’s office, it was closed.

## **2. The Fraudulent Schemes of Unauthorized Practitioners**

The fraudulent schemes of unauthorized practitioners take many forms, including charging exorbitant rates to do no work, claiming that immigrants qualify for either fictitious forms of relief or legitimate ones for which they do not, and providing immigrants with fraudulent documents.<sup>286</sup> For instance, the U.S. Department of Justice reported that Jose Mendoza De La Merced and Don Thomas Banzon, along with others, instituted a complex scheme to defraud unsuspecting immigrants of roughly \$11 million.<sup>287</sup> Mr. Merced and Mr. Banzon lied to their clients and told them that they were able to obtain legal status through a new law enacted by President Clinton. They then filed political asylum applications, but never told their clients. In addition, they conducted sham visits to the INS in which the unsuspecting victims thought that they were going through the immigration process.

### *Practitioner Charges Low-Income Immigrants Exorbitant Fees for Immigration Services and Does Nothing for Them*<sup>288</sup>

In December 1994, “Mr. D-” went to the office of “Mr. E-” in Staten Island. Mr. E- held himself out as an “abogado” (lawyer.) Mr. E- told Mr. D- that he could help him and his wife obtain work papers. In their first meeting, Mr. E- asked Mr. D- to present his passport, birth certificate, foreign drivers’ license, and identification card. He asked for the same documents for his wife and daughter. Mr. E- copied the documents and told Mr. D- to check with him in a month. At this meeting, Mr. D- paid Mr. E- \$3,000.

A month later, Mr. D- contacted Mr. E-’s office and was told to bring an additional \$2,000. When he brought the money, he received assurances that all was fine with his case. Mr. E- reported that he had gone to the INS and had talked to the agency about Mr. D- and his family. He explained that the INS was processing their papers, and told Mr. D- to call him back in three months.

Mr. D- waited two months and then went by Mr. E-'s office. Mr. D- found the office empty and closed. Mr. E- had disappeared and, with him, Mr. D-'s \$5,000. Unfortunately, Mr. D-'s experience is common.<sup>289</sup>

### *Notary Charges Fees to Prepare Applications for Nonexistent Immigration Programs or for Legitimate Programs for Which the Client Does Not Qualify.*<sup>290</sup>

After living and working in the United States for a few years, "Mr. P-" learned from a friend that a man in Texas could help him adjust his status to lawful permanent resident. In a telephone conversation, Carlos Alberto Novoa represented that he was a notario and instructed Mr. P- to travel to Texas to fill out the necessary papers.

In Texas, Mr. P- gave Mr. Novoa his personal documentation, as well as that of other family members, along with \$3,950. Mr. Novoa explained that this money would go directly to the INS. He also told Mr. P- that everything would be ready soon and that he would receive a work permit in the ensuing months.

As word spread about Mr. Novoa's services, many immigrants sought his assistance. Mr. Novoa came to Santa Rosa, California to serve more clients. When Mr. P- asked him about the status of his case, Mr. Novoa told him that his "priority date had arrived and that it would be another month." Eighteen months later, Mr. P- still had not received anything from Mr. Novoa.

Mr. P- realized that he had been scammed when he heard that the notario had been arrested. Mr. P- admitted that he had no idea that Mr. Novoa was cheating. Mr. Novoa stole the precious savings of Mr. P- and others by preparing immigration papers for a nonexistent amnesty program that he simply invented.

### **3. Financial Damages and Loss of Documents**

Just as unscrupulous notaries use many different schemes to defraud immigrants, victims experience many different types of harm. Many immigrants earn minimum or sub-minimum wages. Thus, even the theft of a small amount of money can create severe financial hardship for the victim and the victim's family. In fact, the financial loss can be quite significant.

### *Immigrant Family Loses Thousands of Dollars in Fees and Travel Costs Due to Fraud in Provision of Immigrant Legal Services*

In June 1998, "Mr. M-" learned from a friend that an immigration attorney in Miami could help him and his wife obtain lawful permanent residence. At the time, Mr. and Mrs. M- lived in New England. He was told to book a flight to Miami and bring completed INS medical examinations, along with \$7,000.

In September 1998, Mr. and Mrs. M- flew to Miami. They met "Mr. RS-" and gave him their identification cards, birth certificates and marriage certificate. At his office, they filled out immigration forms and signed papers. Mr. RS- told them that based upon their employment, they were eligible for lawful permanent residence. He explained that they would receive temporary residence cards in four months and permanent residence cards in eight months. When they left, Mr. RS- gave them a letter stating that papers had been filed with the INS, and that they were awaiting a response.

At home in New England, Mr. M- tried repeatedly to contact Mr. RS-. Each time, he received no response. He sought help at New Hampshire Catholic Charities, Inc., whose efforts to reach Mr. RS- through a staff attorney proved unsuccessful. Soon thereafter, the Catholic Charities attorney filed a Freedom of Information Act (FOIA) request in New England and in Florida to determine what, if anything, had been filed on Mr. and Mrs. M-'s behalf. Both FOIA requests came back negative – no applications had been received. According to Mr. M-, at least 20 other victims flew to Miami to obtain immigration assistance from Mr. RS-.

Notaries often keep their clients' original documents, such as birth certificates or passports. Sometimes they wrongly send the original documents, rather than certified copies, to the INS. When they disappear, the victims lose these important documents, compromising their ability to ever receive benefits.

In 1997, Notre Dame Legal Aid Clinic and Farmworkers Legal Services filed a lawsuit against Ms. Rosales, the "attorney" from Michigan, on behalf of her "clients." When the judge ruled in favor of the victims, Ms. Rosales disappeared. The judge appointed Notre Dame Legal Aid Clinic and the Farmworkers Legal Services custodians of 1,200 files that had been seized from Ms. Rosales office. Among

them were INS forms that had never been filed with the INS, original family documents (such as passports and birth certificates), unfiled immigration applications, and letters of action taken by the INS.

#### 4. Prosecuting Fraud

As Attorney General Reno has recognized, immigration fraud is a national problem from which no immigrant community is immune.<sup>291</sup> Unfortunately, prosecuting and preventing fraud can be extremely difficult. Unscrupulous service providers frequently change business locations to avoid investigations and prosecutions. Mr. and Mrs. M- simply could not reach Mr. RS- in Florida; his receptionist did not provide any information as to his whereabouts. "Mr. D-," from Staten Island, recounted that the man who cheated them completely disappeared.

In addition, cases of fraud often go unreported. Undocumented immigrants are reluctant to seek assistance from law enforcement authorities because they fear deportation, as well as the penalties for submitting fraudulent documents. They may also feel shame at having been swindled.<sup>292</sup> Mr. M- from New England recounted that he was one of 20 individuals who flew to Miami to obtain immigration assistance from Mr. RS-. He admitted that he and the other victims of the scam were afraid to report the "immigration attorney" to the police because they feared that they would be deported. "Mr. P-" from Santa Rosa said that he knew 40 other individuals who Mr. Novoa had robbed. Although Mr. P- testified against Mr. Novoa, most of his other victims did not.

Finally, while the INS assigns agents to investigate fraud, it does not have a policy that grants immunity to victims who agree to report fraud and assist in its prosecution. Victims of fraud will remain reluctant to cooperate with the INS without some type of agreement that ensures that they will not be adversely affected.

##### *Immigrants Reluctant to Testify Against Notaries Due to Feared Immigration Consequences*

A *notario* in Camden, New Jersey charged Mexican nationals \$1,500 and more to file bogus employment authorization claims.<sup>293</sup> The *notario* worked as a clerk in the local county court and did immigration work on the side. As the fraud continued, the INS began to investigate. However, the agency refused to make any

promises regarding immunity to victims who had been cheated. Lacking a complaining witness, the INS was stymied. Without some promise of immunity or other form of relief, victims of the fraud were unwilling to speak to the INS. They feared deportation and other adverse consequences.

A breakthrough came in the case when the *notario* sued one individual to collect his fee. When the victim came to the Camden Center for Law and Social Justice, Inc., the office called the Superior Court to see if an opposing attorney was involved. The clerk could not locate a case under that docket number. The *notario* had abused his access to the court's filing system and issued a bogus complaint. A few days later, the *notario* visited the victim, threatening him with bodily harm if he did not pay. Anxious about his safety, the victim again considered cooperation with the INS. Yet, INS investigators still refused to make any formal promise of relief or immunity. After days of indecision, the victim again refused to cooperate, fearing that his actions would jeopardize the safety of his housemates.

Concerned about the threats and the more brazen nature of the scam, the Camden Center for Law and Social Justice, Inc. outlined the problem for the county prosecutor's office. After some consideration, they concluded that they could move against the *notario* with a statement from the victim but without an expectation that he would testify. The victim agreed. A statement was signed and the police arrested the *notario*. Some months later the *notario* pled guilty to official misconduct.

As this case illustrates, community organizations can play a vital role in working with law enforcement agencies to ensure that individuals who prey on vulnerable immigrants are prosecuted. For instance, Catholic Charities Immigration Services in Santa Rosa and the Immigration Legal Resource Center worked with local police and the District Attorney to prosecute Mr. Novoa.<sup>294</sup>

##### *Community Organization Works to Curb Predatory and Illegal Practitioner*

Mr. Herrera had built up a lucrative "business" with an office on a main street, secretarial staff, and bogus "diplomas" on his wall.<sup>295</sup> He informed his "clients" that he was a lawyer and could get them green cards. He often identified

himself on INS applications as an “attorney at law.” He even participated in a community forum with the Consul General of El Salvador, where he appeared as an immigration ‘expert.’ However, Mr. Herrera was not an attorney. In 1998, he sent a mass mailing to unwary immigrants announcing that it was time to apply for residency. He subsequently filed worthless residency applications on behalf of his “clients.”

A newspaper reporter from *Newsday* became interested in the case and published the story of one victim. This prompted the District Attorney to act. The police arrested Mr. Herrera. The District Attorney’s Office enlisted the Central American Refugee Center (CARECEN) to help with the complaints. CARECEN attorneys launched an outreach campaign to locate more victims. CARECEN provided press releases to the local Hispanic press, held meetings to inform clients of the fraud, and posted flyers with Mr. Herrera’s face on it.

Although many of the victims were afraid, they agreed to be witnesses and help prosecute Mr. Herrera. At the first meeting with the prosecutor, the witnesses realized that they were not alone in this scam. Additionally, the prosecutor learned more about the immigrant community and gained a better understanding of how immigration fraud damages people.

The witnesses agreed to testify before the grand jury. Testifying in court can be daunting for the undocumented. At the behest of CARECEN, the prosecutor agreed to sign a document that no personally identifiable information would be given to the INS in order to protect those who were undocumented. This agreement allayed some of the witnesses’ concerns. Their testimony before the grand jury went well. Mr. Herrera was indicted. Soon thereafter, he entered a guilty plea and was sentenced.<sup>296</sup>

Many of the witnesses came to Mr. Herrera’s sentencing. The prosecutor informed them that they could, if they wished, make a statement to the judge before sentencing. Each stood up and told the judge what had happened to them and asked him to stop Mr. Herrera from hurting others.

## K. Conclusion

Many of the anti-family provisions in the Immigration and Nationality Act pre-date the 1996 Immigration Act. In other instances, neutral or even pro-family provisions have been implemented in ways harmful to immigrant families. However, the 1996 Immigration Act gave birth to some of our nation’s most egregiously anti-family provisions. The Act purported to target only the undocumented. In fact, it directly targets U.S. citizens and lawful permanent residents. At the same time, its efforts to root out the undocumented rested on the assumption that the undocumented could be surgically removed, excluded, or burdened without negatively affecting their U.S. citizen and lawful permanent resident family members. The reality of mixed status families gives the lie to that notion.

This report has aimed to be descriptive, not prescriptive. It has highlighted the many areas in our nation’s immigration system in which family reunification simply does not matter. It leaves to policymakers to determine whether these laws and policies further our nation’s interests, or undermine its very foundation — the family.



Photo Courtesy: USCR

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# G L O S S A R Y   O F   T E R M S

**245(i).** A provision of the Immigration and Nationality Act (INA) that allows immediate relatives of U.S. citizens and lawful permanent residents to pay a fee (initially \$650, but later raised to \$1,000) to complete their permanent residence applications in the United States, regardless of illegal entry or undocumented status. This provision has expired. Although beneficiaries of immigrant visa petitions filed prior to January 15, 1998 may continue to adjust status in the United States under this provision, others must be processed for an immigrant visa through a U.S. consulate.

**Adjustment of Status.** The process by which foreign-born persons become lawful permanent residents in the United States. An applicant for adjustment of status must either have an approved immigrant visa petition and a current priority date or be the immediate relative of a U.S. citizen.

**Aggravated Felony.** A term that initially appeared in the Anti-Drug Abuse Act of 1988 (Public Law No. 100-690). At that time, the term included murder and certain drug and firearm trafficking crimes. Since 1988, the definition of aggravated felony has been expanded numerous times. Today, it encompasses a wide range of crimes including crimes of violence, theft or burglary for which a term of imprisonment of one year or more is imposed. If a one-year sentence is imposed but suspended (i.e., no jail time is served by the person who commits the crime), such crime is still considered an aggravated felony. The definition appears at INA §101(a)(43).

**Anti-Terrorism and Effective Death Penalty Act (AEDPA).** (Public Law No. 104-132). Enacted in 1996, a law that broadened crimes leading to removal, eliminated relief from removal for many crimes, and attempted to limit judicial review. It served as a precursor to the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which supplemented many of its provisions and replaced others.

**Asylee.** A person who has been granted asylum in the United States because he or she is unable or unwilling to return to his or her country of origin due to persecution or a well-founded fear of persecution.

**Asylum.** A form of protection available to persons physically present in the United States or at a port of entry seeking admission to the United States, who fear returning to their native country due to past persecution or a well-founded fear of future persecution. The persecution must be based on one of five grounds: race, religion, nationality, membership in a particular social group or political opinion. Asylum status is granted in the United States, after an application for asylum is approved under section 208(a) of the Immigration and Nationality Act (INA). One year after being granted political asylum, an asylee may apply for permanent residence in the United States.

**Beneficiary.** The qualifying immigrant relative of the U.S. citizen or lawful permanent resident or the employee of the employer who filed the immigrant visa petition. The beneficiary of an immigrant visa petition is the individual who is seeking lawful permanent resident status.

**Board of Immigration Appeals (BIA).** The administrative appeals court for decisions made by Immigration Judges, INS District Directors and other immigration officials.

**Code of Federal Regulations (CFR).** A compilation of the rules that govern the agencies of the federal government. The CFR is divided into 50 titles that represent broad areas subject to federal regulation. Title 8 pertains to Immigrants and Nationality and is composed of all regulations issued by the INS.

**Consular Processing.** The process by which an immigrant visa applicant obtains his or her immigrant visa through a U.S. consulate abroad.

**Exclusion Hearing.** A type of legal proceeding previously applied to persons attempting to enter the United States who were inadmissible under U.S. immigration law. In other words, a proceeding applied to persons who had not yet entered the United States. Prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), two types of proceedings existed to remove non-citizens from the United States: exclusion and deportation. IIRIRA combined both of these proceedings into one proceeding, which is now known as "removal."

**Executive Office for Immigration Review (EOIR).** The division within the Department of Justice responsible for interpreting and administering federal immigration laws and regulations. EOIR accomplishes its tasks through immigration court proceedings, appellate reviews, and administrative hearings of individual cases. EOIR has three main components: the Board of Immigration Appeals, the Office of the Chief Immigration Judge, and the Office of the Chief Administrative Hearing Officer.

**Expedited Removal.** A process that provides for the immediate removal from the United States of individuals who arrive without valid travel documents, such as a passport and visa. Persons removed in expedited removal proceedings are barred from reentering the U.S. for a minimum of five years. In order to avoid immediate removal, asylum seekers who arrive without proper entry documents must demonstrate a credible fear of returning to their native country.

**Expungement.** The process by which the record of a prior criminal conviction is destroyed or sealed.

**Good Moral Character.** A requirement for several forms of relief from removal under the INA. Good moral character is not defined in the INA nor in the regulations governing the INS. Under the INA, persons who have committed certain crimes, including most drug crimes, smuggling, and prostitution are ineligible to show good moral character. When examining a person's general conduct, an Immigration Judge may use his or her own discretion to determine a person's moral character.

**Humanitarian Parole.** A form of admission, granted by the Attorney General, for persons who are otherwise ineligible to enter the United States. Humanitarian parole is only issued in cases involving urgent and compelling factors, such as medical emergencies, or in cases involving significant public benefit. It is temporary and only issued to coincide with the duration of the relevant emergency or humanitarian situation. There is a maximum time limit of one year for a humanitarian parole. Under U.S. immigration law, the term "parole" carries no criminal implications.

**Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).** (Public Law No. 104- 208). Enacted on September 30, 1996, a law that dramatically altered U.S. immigration law. It created several new grounds of inadmissibility, restricted the ability to apply for asylum, changed inspections and removal processes, and altered provisions relating to public benefits, document fraud and the detention of immigrants.

**Immediate Relative.** This term, used in the context of family-based immigration, refers to the following: (1) spouses of U.S. citizens; (2) unmarried children (under the age of 21) of U.S. citizens; and (3) parents of U.S. citizens over the age of 21. There are no annual limitations on the number of immigrant visas that may be issued to immediate relatives.

**Immigrant Visa Petition.** The application (form I-130 or I-140) filed by a U.S. citizen, lawful permanent resident, or employer, to request an immigrant visa for a qualifying relative or employee. The immigrant visa petition is filed with the INS.

**Immigration and Nationality Act (INA).** Enacted in 1952, the statute encompassing U.S. immigration law. The INA is also found in the United States Code (U.S.C.), a complete collection of the laws governing the United States. Title 8 of the U.S.C. pertains to Immigrants and Nationality.

**Immigration Reform and Control Act of 1986 (IRCA).** The statute creating our nation's last "amnesty" for undocumented persons. IRCA, passed in November 1986, was written to better control and deter undocumented immigration to the United States. IRCA created sanctions against employers who knowingly hire foreigners not permitted to work in the United States. IRCA also implemented three amnesty programs that permitted certain persons who had been living or working in the United States for various periods of time to become lawful permanent residents.

**Inadmissible.** The legal term applied to a person who is not eligible to enter the United States or adjust status to lawful permanent residence in the United States. A person who is inadmissible to the United States may not be issued an immigrant visa. Common inadmissibility grounds include health-related problems, previous criminal activity, the possibility of becoming a public charge, fraud, prior removal from the United States or previous unlawful presence in the United States.

**Indefinite Detention.** An undetermined period of INS confinement faced by immigrants who have been ordered removed from the United States, but whose countries of origin will not accept them. Generally, the INS must remove an immigrant with a final order of removal within 90 days of the date of issuance of that order. Nationals from countries with whom the U.S. government does not have diplomatic relations or that will not cooperate in the repatriation of their nationals, such as Cuba, Vietnam, China, Cambodia, Laos, Iran, Iraq and Somalia, cannot be removed. In addition, Haitian nationals who are unable to obtain travel documents cannot be removed. In such cases, prior to the conclusion of the 90-day period, a review of the individual's continued detention must be conducted. This review is conducted by an INS District Director who has discretion to either grant or deny release. If not granted release from detention after a review, they face prolonged detention for uncertain periods of time. Lawful permanent residents of the United States may be subject to indefinite detention.

**Lawful Permanent Resident (LPR).** A foreign-born resident of the United States, who has the right to continuously live and work in the United States. Lawful permanent residents do not have the right to vote and are subject to deportation if they are convicted of certain crimes. Lawful permanent residents are 'green card' holders.

**Legalization.** The process by which certain undocumented persons secured legal immigration status in the United States by applying for temporary residence under the Immigration Reform and Control Act of 1986 (IRCA). Later, such persons adjusted to or were allowed to apply for lawful permanent resident status.

**Mandatory Detention.** The detention of immigrants with criminal convictions awaiting removal, as mandated by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). There is no possibility of release on bond for such persons. Persons subject to mandatory detention include those subject to expedited removal proceedings (including asylum seekers, until they establish that they have a "credible fear" of persecution in their home country); persons who have final orders of removal (even if INS is unable to deport them); and many immigrants convicted of crimes. However, immigrants convicted of crimes who completed their criminal sentences prior to October 9, 1998, who do not pose a danger to the community, and who demonstrate a strong likelihood to appear for their hearing, may be exempted from mandatory detention.

**Means-Tested Public Benefit.** Certain public benefits funded wholly or partially by the federal government. They have been defined to include Supplemental Security Income (SSI), Food Stamps, Temporary Assistance for Needy Families (TANF), Medicaid, and Children's Health Insurance Program (CHIP).

**National Visa Center (NVC).** The immigrant visa processing facility operated by the Department of State in Portsmouth, New Hampshire. After an immigrant visa petition for an immigrant who will be consular processing abroad is approved by the INS, it is forwarded to the NVC. When a visa is available to the beneficiary of the petition, the NVC forwards the petition to a consular office abroad. Visa availability is dependent upon the visa preference category, filing date, and country of birth of the visa applicant.

**Non-immigrant.** A person holding a visa limited for a certain period of time and activity. Non-immigrant visas are available for tourism, business, temporary work, religious work, farm work, educational purposes and others. While the non-immigrant is residing in the United States, his or her activity must be consistent with the provisions of his or her visa.

**Notice to Appear (NTA).** The charging document that lists the legal grounds and sections of the INA under which the INS plans to remove an immigrant. The issuance of a NTA to the immigrant commences removal proceedings.

**Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).** (Public Law No. 104-103). Enacted on August 22, 1996, legislation that limited non-citizen access to federal public benefits. PRWORA also gave individual states the authority to impose similar restrictions to state-funded programs. Prior to the passage of PRWORA, U.S. citizens and lawful permanent residents enjoyed similar eligibility for welfare programs funded by their tax dollars.

**Petitioner.** A U.S. citizen or a lawful permanent resident who files an immigrant visa petition for their immigrant relative, or an employer who files an immigrant visa petition for an employee.

**Preference Category.** A class of beneficiaries of approved immigrant visa petitions who are subject to annual immigration quotas. Each category is determined by the beneficiary's relationship to the petitioner. The four family-based preference categories are: unmarried adult (21 or older) sons and daughters of U.S. citizens (first preference); spouses or unmarried children (regardless of age) of lawful permanent residents (second); married sons and daughters of U.S. citizens (regardless of age) (third); brothers and sisters of U.S. citizens over 21 (fourth).

**Priority Date.** The date that an immigrant visa petition is filed with the INS. The date contributes to determining the timing and distribution of immigrant visa numbers. With the exception of spouses, minor unmarried children and parents of U.S. citizens, there are annual limits on the number of family-sponsored immigrants who can be admitted to the United States. These immigrants are classified into different preference categories. In each category, there are more applicants for permanent residence than there are immigrant visas available. As a result, a waiting list for immigrant visas has developed. To control the distribution of immigrant visas to those waiting, 'priority dates' are assigned. Immigrant visas are distributed in chronological order according to these priority dates.

**Refugee.** A person who has fled his or her country of origin because of past persecution or a well-founded fear of persecution. This persecution or fear must be based upon one of five grounds: race, religion, nationality, political opinion, or a membership in a particular social group. Refugee status is granted outside the United States. The United Nations High Commissioner for Refugees (UNHCR) interviews refugees outside their country of origin to determine eligibility for UNHCR protection. If UNHCR decides a refugee cannot be safely returned to his or her home country or cannot remain in a country of first asylum, he or she is referred by UNHCR for resettlement in another country. If a refugee is referred to the United States for resettlement, an INS officer interviews the person outside the United States in order to determine whether he or she may be granted refugee status under U.S. law. If granted refugee status, the refugee may enter the United States. One year after entry into the United States, a refugee must apply for lawful permanent residence.

**Removal Proceedings.** The process during which an Immigration Judge determines whether a non-citizen may remain in the United States or must be removed. Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, these proceedings were referred to as deportation or exclusion proceedings.

**Self-Petition.** An immigrant visa petition filed by the abused spouse or child of a lawful permanent resident or U.S. citizen. Such petitions are filed without the assistance of the abusive relative, in accordance with the Violence Against Women Act (VAWA). The parents of certain abused children of lawful permanent residents and U.S. citizens are also eligible to file self-petitions.

**Visa.** The official document issued by the U.S. Department of State at a U.S. Embassy or Consulate abroad that grants an individual legal permission to enter the United States for a particular purpose.

**Voluntary Departure or Return.** A form of relief from forcible removal that allows a person in removal proceedings to depart the United States at his or her own expense. By agreeing to depart the United States voluntarily, one avoids the consequences of a formal order of removal, which prohibits a person from reentering the United States for ten years.

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